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In the Supreme Court of the United States

OCTOBER TERM, 1975

DANA I. KESTENBAUM,
Petitioner,

vs.

FALSTAFF BREWING CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

ED P. MAGRE
Humble & Magre
Cameron, Texas

JACK N. PRICE
306 E. 11th, Suite L-7
Austin, Texas 78701

ATTORNEYS FOR PETITIONER

Langley's, 2213 E. Austin, P. O. Box 278, Marshall, Texas 75670, 214/938-8002

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Petitioner, Dana I. Kestenbaum, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 16, 1975, as corrected on October 15, 1975.

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 514 F. 2d 690. No opinion was rendered by the District Court.

JURISDICTION

The judgment of the Court of Appeals was entered on June 16, 1975. A timely filed Petition for Rehearing and Petition for Rehearing En Banc was denied on October 15, 1975, and this petition is filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1245(1).

QUESTIONS PRESENTED

First Question

The Court of Appeals held that the Plaintiff, a former Falstaff distributor, suffered no compensable injury from the Defendant Brewing Corporation's admittedly wrongful price fixing activity. This holding was reached against a background of facts which revealed that, during the pertinent period, Falstaff required Kestenbaum to set his price at a level fixed by other local wholesalers of "popular" beers and stay a certain amount below the price of "premium" beers and to "clear" each price change with Falstaff. Each time a change approved by Falstaff resulted in a price increase, Falstaff automatically "took" one-half of the price increase, i.e., added one-half of the price increase to the price charged Kestenbaum. Mr. Kestenbaum testified that in reasonable probability he would have stayed competitive with the price of the local "popular" beers without direction from Falstaff. There was no evidence that Falstaff would have increased its price to Kestenbaum in the absence of the price fixing scheme, i.e., there is no evidence that any price increase to Kestenbaum would have been made except as part of the price fixing mechanism.

The Court of Appeals also held that loss due to "price promotions" (conceded to be "price fixing") was not

recoverable where the evidence did not show which promotions were voluntary and which were coerced, even though it was undisputed that adherence to the price fixing and resultant loss was required by Falstaff regardless of whether the distributors participation was voluntary or coerced.

Therefore, the first question is in two parts:

1. (a) Does a price increase by a seller which is tied to or "coupled with" a price fixing requirement imposed on a buyer afford a basis for proof of injury and measurement of damages resulting from the per se violation?

   (b) Is a distributor prevented from recovering damages resulting from a price-fixing "price promotion" scheme because participation in some promotions was voluntary, where it is undisputed that adherence to price fixing was required by Falstaff regardless of whether participation was coerced or voluntary?

Second Question

In the second section of the opinion of the Court of Appeals it is held that the trial court erred in instructing the jury that if it found that Falstaff dictated the sale price to Kestenbaum's distributorship, Falstaff would be guilty of a per se violation of the antitrust laws. The lower court concluded that Falstaff could legitimately restrict the price at which Kestenbaum could sell his business, disregarding "rule of reason" considerations. Though the portion of the court's opinion dealing with this question focuses on the per se violation of price fixing, the context within which the conclusion was reached is slightly broader. The evidence revealed that not only did Falstaff control the price at which Kestenbaum could sell his dealership, Falstaff also controlled the person(s) to whom it could be sold. This raises a question of the "outlet" type of restraint con-

demned in *United States v. Arnold Schwinn & Co.*, 388 U.S. 365. Thus, the question raised by the second section of the lower court's opinion may be stated:

2. Do restrictions upon the price at which and the person(s) to whom a distributorship or franchised business may be sold amount to per se violations of the Sherman Act?

Third Question

In the third section of the lower court's opinion, it is held that the trial court erroneously submitted to the jury an issue as to whether Falstaff was guilty of restraining sales to customers outside Mr. Kestenbaum's prescribed geographical area. The opinion indicates that this was erroneous because the instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs, conceded to be legitimate damages arising from territorial restrictions imposed by Falstaff. The references to restraints on sales to customers outside Kestenbaum's prescribed geographical area, in the trial court's charge to the jury, are within the context of definition of the per se violation of territorial and customer, or "outlet", restriction. There was no proof of any loss resulting from failure to make sales to any customer outside the prescribed geographical area, and there was no claim by the Plaintiff that any such loss occurred. Furthermore, the Respondent failed to object to the instructions and waived any possible error. Therefore, the third question is also in two parts:

3; (a) Do explanatory instructions regarding the offense of territorial restriction, which make reference to restrictions on sales to customers outside a prescribed geographical area, require reversal where the plaintiff makes no claim for damages resulting from loss of sales to customers outside such territory, and the proof is such that the jury could not be con-

3. (a) fused with regard to the type and amount of damages claimed?

(b) Did Respondent waive any possible error regarding such instructions by failure to object?

Fourth Question

In the fifth and final section of the lower court's opinion the conclusion is reached that a showing of "public injury" is still required in the proof of a non-per se violation under Section 1 of the Sherman Act. Actually, the observations of the Court of Appeals are surplusage, since the trial court instructed upon public injury. Those instructions were not attacked and there is no indication that the proof was not sufficient to sustain a jury finding of "public injury". However, Falstaff urged contentions which equated proof of "public injury" with proof of specific injury to competition. The Court of Appeals correctly held that proof of specific injury to competition is not required, but mixed and apparently used interchangeably the concepts of "public injury", "restraint of trade", "unreasonable restraint of trade", and "rule of reason". Therefore, the fourth question is:

4. Is proof of "public injury" as a separate element in the "rule of reason" test still required in the proof of a non-per se violation of the Sherman Act?

STATUTE INVOLVED

The statutory provisions involved are Section 1 of the Sherman Act, 15 U.S.C. Sec. 1, and Section 4 of the Clayton Act, 15 U.S.C. Sec. 15, which provide in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracty, in restraint of trade or commerce, among the several states, or with foreign

nations, is hereby declared to be illegal."

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent: . . ."

STATEMENT OF THE CASE

In 1934, Dana Kestenbaum's father, Sam Kestenbaum, secured a Falstaff beer distributorship for Milam, Robertson, Burleson, Brazos, Falls and Bell Counties, Texas. (R. 24) In 1937 Bell County was given to the distributor in Temple, Texas. at the direction of Falstaff. (R. 24) Nothing was paid to Sam Kestenbaum for the loss of distribution rights in Bell County. (R. 25)

Sam Kestenbaum continued to operate the distributorship in the remaining counties until approximately 1950 when Dana Kestenbaum became an active partner. (R. 25) In 1967, Dana Kestenbaum took over the distributorship and operated it until its termination. (R. 25)

In the earlier years, the distributorship was operated without a written agreement. (R. 31, et. seq.) During the 1960's Falstaff and the Kestenbaums entered into three separate franchise agreements covering the four counties then comprising the distributorship. (R. 34-35) Each franchise agreement (of which P. Ex. 1, covering Milam and Robertson Counties is an example) covered a different county or counties. At Falstaff's direction, warehousing and distribution facilities were maintained in each of the three continguous territories covered by the agreements. (R. 25, 26, 27, 41, 42, et. seq.) The distributorship operated under the three original written agreements until terminated. Falstaff's basic policies and operating procedures with relation to the distributor, both as specified in the franchise agreements and "ex contractu", remained basically the same before and after the agreements were signed

The franchise agreement defines and delineates certain

obligations and responsibilities of the distributor and the Falstaff Brewing Corporation. Under its terms, the distributor is, except to the extent of the obligations imposed by the agreement, ostensibly a free and independent businessman. In truth and in fact, however, Falstaff imposes many requirements upon the distributor which are not embodied in the franchise agreement, and which are in addition to the terms of the agreement. Falstaff is enabled to require adherence to these requirements because it is economically more powerful than the individual distributor, controls the distributor's source of supply, retains the arbitrary and unfair right of cancellation upon short notice (which could operate to inflict severe financial loss upon the distributor), and retains the right of approval of any purchaser of the distributorship. (See P. Ex. 1, paragraphs 5, 6(a) and discussion of Kestenbaum's testimony relating to direct and implied threats by Falstaff and his fears of cancellation.)

The distributorship arrangement amounts to a system of territorial and customer allocation whereby each distributor sells, and is permitted to sell only to customers located within the territories specified by the written or verbal agreements with Falstaff. (R. 32, 33, 118) This allocation and market division has been firmly and resolutely maintained by Falstaff through the years. (R. 32, 33) In addition, at all times while Kestenbaum was a distributor, Falstaff fixed the prices at which he sold beer to retail accounts. (R. 44-45, 46, 47.) For a greater portion of the period of existence of the distributorship, i.e., until approximatiey 1966, Falstaff fixed the prices directly by instructing Kestenbaum to change his price to a certain amount at a certain time. (R. 44) During the last few years of the distributorship the system changed slightly, and the Plaintiff was instructed to "do what the others do" (referring to other beer wholesalers in the area) within guidelines established by Falstaff, i. e., Plaintiff was instructed to maintain his retail price at a certain level below Budweiser and Schlitz (the "premium" priced beers) and to "stay competitive" with (that is, to charge the same as) other local or "popular" brands. (R. 45, 46, 47) When, in acting pursuant to these directions, Kestenbaum secured a price increase, Falstaff took one-half of the increase,

i.e., raised its price to Mr. Kestenbaum by an amount approximating one-half of the increase. (R. 45-46)

Falstaff also periodically required Mr. Kestenbaum to engage in "price promotions". Certain price promotions were on an ostensibly voluntary basis, but others were mandatory. (R. 52) Pursuant to these price promotions, Mr. Kestenbaum was instructed to sell at a certain discount off regular price. (R. 53, et. seq.) Mr. Kestenbaum would stand one-half of the loss resulting from the decrease, and Falstaff would stand the other one-half of the decrease. Ibid. Regardless of whether voluntary or involuntary, all price promotions were originated by Falstaff, and compliance therewith by Kestenbaum, whether voluntary or coerced, amounted to a prohibited form of price-fixing, which resulted in a loss to Mr. Kestenbaum on every case sold during such promotion.

According to Mr. Kestenbaum's testimony, commencing in the early 1960's, and continuing through the termination of the distributorship, Falstaff, operating from the vantage point of the restrictive franchise agreement, with its short-notice termination provision and requirement for approval by Falstaff of any purchaser of the business, imposed arbitrary operating requirements upon Mr. Kestenbaum and required his participation in various programs which caused him excessive expenditures without commensurate increase of business.

In 1961, Falstaff gave Mr. Kestenbaum the choice of meeting certain arbitrary requirements or surrendering Falls County. Mr. Kestenbaum chose the latter alternative and was thus economically coerced to give up his franchise rights in Falls County without compensation. (Because of limitations, no effort was made to prove damages resulting from the loss of Falls County, and the court gave the jury an instruction to disregard the loss of Falls County in assessing damages. The evidence was admitted, without objection, as proof of the continuing practices and policies of Falstaff.)

Continuing thereafter, Mr. Kestenbaum was subjected to various practices increasing the expenses of operating his business without producing offsetting income. These practices included the following:

(a) Requiring Mr. Kestenbaum to establish and maintain warehouse facilities in Caldwell, Cameron and Bryan, thereby causing unnecessary inventory to be stockpiled, which increased interest expense, insurance, transportation costs, and expenditures for establishment and maintenance of the unnecessary warehouses;

(b) Demanding that Mr. Kestenbaum expend money for bar spending and exerting pressure throughout the period to increase bar spending, resulting in excessive bar spending without producing commensurate increase in business;

(c) Requiring participation in the distributor advertising programs, which did not produce additional business to off-set the expense involved;

(d) Supervising Plaintiff's operations, making unwarranted criticism and threats of termination by institution of "corrective" measures, which was disruptive and inhibited effecient operation of Plaintiff's business;

(e) Imposing arbitrary requirements regarding method of transportation and points of delivery of beer; and

(f) Refusing to allow Mr. Kestenbaum to close either the Caldwell or Cameron warehouses, while at the same time indicating that the two warehouses could be closed if Mr. Kestenbaum would move to Bryan and operate out of the Bryan warehouse, and then refusing to allow Mr. Kestenbaum to operate out of the Bryan warehouse unless he moved to Bryan.

Becasue of these practices and the resulting unprofitable operation, in the early part of 1971 Mr. Kestenbaum sold the remaining parts of his distributorship (distribution rights in the remaining four counties). The act of selling was not voluntary but done because no other reasonable course was offered. Mr. Kestenbaum was forced to salvage as much as he could from his investment in the business. But Mr. Kestenbaum was not allowed to freely select a buyer and negotiate a sale at arm's length. Falstaff, in effect, dictated the sales price that Mr. Kestenbaum was to obtain and allowed him to sell only to persons approved by Falstaff, thereby causing the loss of one sale and requiring sale on considerably less favorable terms than Mr. Kestenbaum could have negotiated with a willing, qualified buyer.

Against this general background, Mr. Kestenbaum contended, and the jury agreed, that the arrangement between Falstaff and its distributors, including both the terms contained in the written franchise agreement and the additional requirements made of the distributors either through voluntary agreements or coerced compliance, amounted to a "contract, combination, or conspiracy" in restraint of trade. This illegal arrangement contained features of price-fixing and restraints on sale of property (including customer and territorial restrictions) coupled with the arbitrary, contractual, short-term cancellation provision and restriction upon sale or alienation of the distributorship (which, in effect, served as the "enforcement" mechanism). Mr. Kestenbaum contended that through use of this illegal arrangement (coupling contractual terms with enforced "ex contractu" practices) he was coerced, both economically and by direct and implied threats, to comply with requirements by Falstaff which increased his cost of operation, and was forced to sell his distributorship without realizing the full market or "good will" value.

The jury awarded Mr. Kestenbaum exactly one-half of the amount of actual damages he claimed. The Fifth Circuit Court of Appeals remanded for the reasons which are the subject of this petition.

REASONS FOR GRANTING THE WRIT

1.

Price Fixing - Sale of Beer

In the first section of the opinion, the Court of Appeals holds that (1) the petitioner Kestenbaum failed to prove either the fact or the extent of injury resulting from Falstaff's fixing of the price at which he sold beer to retailers, and (2) that Plaintiff could not recover for losses due to price promotions without showing the proportion of the total cost attributable to voluntary, as opposed to involuntary promotions.

It is respectfully submitted that the Court is in error with

regard to both propositions.

(a) The Plaintiff was entitled to recovery of the amount arbitrarily exacted by Falstaff in connection with price increases made pursuant to the price-fixing scheme.

The lower court's opinion characterizes Falstaff's retail price maintenance scheme as a directive to stay competitive with other local or "popular" brands, coupled with a policy of automatically raising the selling price to Kestenbaum by one-half of the amount of any price increase imposed in adherence with the directive. This is correct, insofar as it goes. However, it ignores essential aspects of the price fixing scheme.

The proof shows that prior to 1966, Mr. Kestenbaum would receive calls from Falstaff telling him to go to a certain price on a certain date. Under this system, other beer distributors with whom Mr. Kestenbaum competed operated on the same basis, i.e., were told to set certain prices on certain days (R. 156):

> "A. Yes, they were told to go up, one on a Monday, one on a Tuesday, one on a Wednesday, and so on down the week."

When this system changed in 1966, Mr. Kestenbaum was told by Falstaff that if there was a price change "in the territory" he should meet the price of the popular priced beers and stay a certain amount below the "premium" beers and Falstaff would "take" one-half of the price increase. Regardless of the system used, Mr. Kestenbaum testified unequivocally that his price was always established by Falstaff (R 47):

> "Q. Were you ever, while you were operating, free to go up on your price individually as an independent businessman and take advantage of any profits that might accrue from your raising the price?
>
> "A. No, sir, I was told to follow their guidelines.

> Whatever they said was the price was what I was to follow."

Under the "new" system, Mr. Kestenbaum was required to call Falstaff and get approval before putting price increases into effect (R. 165). Other distributors operating in the area were also told to raise their prices, in effect, by agreement, so as to "do what the competition does". (R. 156). Thus, the only effect of the change in the system was to transfer the price fixing from the brewery level to the distributor level, with control still vested in the brewery. Not only was Mr. Kestenbaum's price artificial, but prices of competing distributors were likewise artificial.

Clearly, therefore, the testimony does not establish the "propriety" of the price of the beer sold by Mr. Kestenbaum, as indicated by the Court of Appeals' opinion. The proof shows without dispute that the price dictated by Falstaff was one corresponding to the atrificial price existing in the industry, and it can hardly be said that such price was "logical and proper". It is true that Mr. Kestenbaum testified to the effect that in all probability he would have remained competitive with other popular brands even without the control exercised by Falstaff. However, contrary to the Court's opinion, this serves to establish rather than defeat the right of recovery, and to measure the extent of the injury.

The fact that Mr. Kestenbaum would have "remained competitive" in the absence of directions from Falstaff estabiishes the level at which Mr. Kestenbaum would have sold his beer if the price fixing scheme had not existed. Under such circumstances, i.e., if the price fixing scheme had not existed, Mr. Kestenbaum would have received the full measure of the price increase, rather than one-half of the price increase. The automatic price increase by Falstaff of one-half of the distributor's "fixed" increase, was "part and parcel" of the price fixing scheme and cannot be divorced therefrom. The erroneous conclusion that this Court reached is embodied in the following sentence from the Court's opinion:

> "While Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis of proof of injury even though it is coupled with a price ceiling requirement which is a per se violation."

To say that the increase is not itself violative of the antitrust laws is to dissect and view the price fixing scheme piecemeal, contrary to all previous antitrust teaching. The Appeals Court donned judicial blinders and accepted the proposition that Falstaff's increases to Kestenbaum stood on their own bottom, free from the taint of price fixing, and were in pursuit of Falstaff's undisputed right to set its sales price. This ignores all the evidence on the point in the record which is to the effect that Falstaff's price increases were tied to and were an integral part of the scheme by which Falstaff controlled the distributor's price.

Accordingly, by proof of the amount that would have been charged in the absence of the price fixing scheme, and proof of the mechanical application of the price fixing scheme, Mr. Kestenbaum has demonstrated a direct loss of one-half of the amount of the price increases during the pertinent period. This establishes the measure of damages, and entitles Mr. Kestenbaum to recovery, contrary to the Court's assertion that the increase in price does not "afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a *per se* violation". The very statement of the proposition contains its refutation. If a price fixer, such as Falstaff, controls the resale price of its coerced victim and, pursuant to the same price fixing scheme, sets and controls the victim's margin of profit, the victim is obviously entitled to recover the amount by which his profit would have been increased in the absence of the price fixing scheme.

This does not affect the right of Falstaff to increase its prices, whether the increase be arbitrary or justified. But there is no proof in the record, and no contention was made in the trial court, that any price increase by Falstaff was justified on any basis, or made for any reason other than as part of the price

fixing scheme. If there was any other justification for Falstaff's price increases, or if the price increases were anything other than a part of the price fixing scheme, the burden was upon the Defendant Falstaff to introduce proof to that effect. It wholly failed to do so.

The net effect of the lower Court's opinion is that in order to recover damages for price fixing, all aspects of the price fixing scheme except the resultant artificial price must be ignored, and damages must be supported and measured by the difference in the artificial price and the price which could and would have been set in the absence of the price fixing scheme. This approach would make it virtually impossible for one whose resale price is fixed to recover damages, for price fixers invariably cause a price to be set which is as high as or higher than the price which would have been set if the price fixing scheme had not existed. Obviously, this is totally unrealistic, and is not sanctioned or supported by any known authority.

If the price fixing scheme, when viewed in its totality, serves to reduce the profits of the one whose price is fixed, and where the reduction is not explained or justified on any basis other than application of the mechanism on the price fixing scheme, recovery of the reduction in profit is authorized. To hold otherwise is unsound, and imposes a stricture on proof of damages in antitrust cases which is not only without foundation, but is in fact contrary to the rationale of those decisions relating to damages which are recognized in the Court of Appeals' opinion.

It is well settled that a plaintiff in a price fixing case who is compelled to pay a higher price for any article affected by the price fixing scheme that he would otherwise pay is entitled to recover the entire amount which would have been paid absent the violation. *Monarch Tobacco Works v. American Tobacco Company,* 165 F. 774 (e.c. Ky. 1908); *Wall Products Co. v. National Gypsum Co.,* 357 F. Supp. 832 (U.S.D.C., N.D.Cal. 1973). This is exactly the damage suffered, and proved, by Kestenbaum, i.e., a higher price paid for beer directly stemming from a price fixing scheme. Recover should have been allowed.

(b) Damages for price fixing in the form of price promotions should be sustained.

The Court of Appeals' opinion holds that although price promotions are a form of prohibited price fixing, Plaintiff failed to establish the right of recovery of damages because he did not distinguish voluntary from involuntary promotions.

It is true that Mr. Kestenbaum testified that he voluntarily participated in some of the price promotions, while others were forced upon him against his will. However, the voluntariness of the price promotions does not furnish the criteria for recovery. In order for Mr. Kestenbaum, or any other distributor to participate in price promotions it was required that he agree to (1) set the price dictated by Falstaff, and (2) suffer loss of one-half of the decrease in price. Had a price allowance been extended to encourage a price promotion, and the price fixing aspect (i.e., establishment of the decreased wholesale price) been eliminated, Mr. Kestenbaum, and other distributors, could have elected to participate by establishing their prices at a level which would not cause loss to them. Under Falstaff's scheme, however, the distributor was required to set the price dictated by Falstaff and thus suffer one-half of the down-price, in order to participate in any price promotion. The loss to the distributor was, therefore, directly caused by the prohibited price fixing, regardless of whether the agreement was induced by the distributor's desire to participate in price promotions, or whether he was forced to participate in price promotions against his will. The determining question is not whether the price promotions were voluntarily pursued by the distributor, but whether the distributor voluntarily suffered one-half of the loss resulting from the decreased price. It is obvious that the distributor was given no choice in the matter. If he desired to participate in a price promotion, he was required to suffer loss as the cost for doing so. This loss was a direct result of price fixing.

Of course, it might be argued that Falstaff was not required to lower its price in order to encourage price promotions. This, however, beggars the point. Falstaff did offer a program of lowered prices in return for participation in price promotions.

Having elected to do so, it could not legally dictate to the distributor the price at which the distributor sold, or require the distributor to suffer any loss by virtue of participation in the price promotion. See the discussion in *Lehrman v. Gulf Oil Corporation,* 464, F. 2d 26 (5th Cir. 1972) Cert. Den. 409 US 1077. The distributor should have been left free to decline to participate in the price promotion, or, if he elected to participate to determine whether he would suffer any loss by virtue of decreased profit margin, and, if so, how much. Since the price-fixing "promotion" scheme employed by Falstaff arbitrarily inflicted upon the distributor a certain amount of loss, the distributor should be allowed to recover that loss.

2.

Price Fixing - Sale of Business

In the second section of its opinion, the Court of Appeals holds that Falstaff may fix a price, without being guilty of price fixing. This is done, so far as can be determined, without the benefit of any direct supporting authority and must be considered a holding "of first impression".

The Court's conclusion that Falstaff could legitimately restrict the price at which Kestenbaum could sell his business (disregarding "rule of reason" considerations) is based upon Falstaff's asserted interest in the selection of the class of persons with whom it would agree to continue a Falstaff franchise, and Falstaff's interest in the financial vitality of a new franchise.

Conceding the legitimate existence of these interests, it is clear that their ends can be served without the necessity of committing acts traditionally held to be violations of the anti-trust laws. Experience, capability, and capital requirements for new franchisees can be fairly and uniformly established and applied in a manner that will allow the distributor to remain free to negotiate for and obtain a price representing the true value of his business.

Fixing the price at which the distributor can sell his business has no more justification than fixing the price at which the

distributor can sell beer. The price paid for the business has only an incidental relationship to the "financial vitality of a new franchisee", which is directly determined by a new franchisee's net worth and possession of sufficient capital to properly operate the business. If a willing seller and a willing buyer negotiate in good faith, it is presumed that they arrive at the market value of the property rights being sold. If the sales price is indeed the true market value, it follows that Falstaff need not be concerned with the purchaser's chance of realizing "a reasonable return on his investment" for such "chance" is obviously present when fair market value is paid. If the purchaser pays more than a fair market price, Falstaff still need not be concerned if the purchaser has the ability and financial resources to properly operate the business. If Falstaff arbitrarily fixes the price at which a distributor can sell his business, Falstaff is guilty of price fixing and price fixing is a per se violation. If the price so fixed is less than the true market value of the business, recoverable damages result.

Falstaff's only legitimate concern with the financial arrangements relating to the sale of a distributor's business is that a new franchisee have sufficient ability and capital to properly operate the business. It is for the purchaser to determine whether he has made a good or bad bargin, and not Falstaff. It is also for the purchaser to determine whether he has a chance to realize a reasonable return on his investment, and to determine how much "return" is "reasonable". The statement in the lower court's opinion that:

> "If the purchaser of a franchise makes a bad bargain when he buys, he cannot give the distributorship the solid, concerned management which it must have to be successful for him and to enhance Falstaff's image and relative position in the market"

is certainly too broad and general to be true (it is also irrelevant). In the modern age of complex tax laws and loop holes, persons or companies very capable of providing "solid, concerned management" may very well desire to make just such a "bad

bargain". Other considerations may also motivate the purchaser to pay an amount Falstaff might not consider reasonable. But the effect of the Appeals Court's opinion is to deprive a seller of the benefit of making such a bargain, or any bargain except that determined by Falstaff, without redress unless the seller can discharge the onerous burden imposed by the "rule of reason".

A rose is a rose, and price fixing is price fixing. This concept should not be sacrificed merely because the price fixing is done in the context of the sale of a franchised business. The owner of the business should be left free to sell to anyone within the legitimately determined class of qualified purchasers. If the sale results in the realization of true or fair market value (as will be true in virtually 100% of the cases) then, by definition, a "good", or fair bargain will result which will allow a reasonable return on investment. If the seller derives more than the true market value then Falstaff will legitimately be concerned with determining whether the purchaser has sufficient capitalization to properly operate the business and retire the indebtedness, and might properly refuse to continue the franchise with the proposed new franchisee if reasonable capital requirements are not met. However, in no event does Falstaff have a legitimate interest in or a right to set, fix, control, or dictate the price at which a distributor can sell his business to an otherwise qualified purchaser.

There is no valid distinction between this type of price fixing and any other type. This proposition is illustrated by the recent Supreme Court case of *Goldfarb v. Virginia State Bar*, Dkt. No. 74-70, decided June 16, 1975, wherein it was held that minimum fee schedules utilized by attorneys charging for service in examining land titles constitute price fixing in per se violation of Section 1 of the Sherman Act. *Noble v. McClatchey Newspaper*, 1972 Trade Cases, Section 561, holds it is a violation to combine to prevent plaintiff from selling his distributorship as a "going concern". *A fortiori*, it is illegal to fix the price of sale of a distributorship so as to prevent realization of going concern value. However, the lower court's opinion carves a special niche for fixing the price of sale of a business, and injects dangerous precedent into the stream of antitrust law which may and undoubtedly will be used to justify attempts to erode settled concepts, and sanction other types of price fixing contrary to the spirit and intent of the antitrust laws.

3.

Territorial Restrictions – Damage Instructions

The third point in the lower court's opinion is that the trial court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside Mr. Kestenbaum's prescribed geographical area. The opinion indicates that this was erroneous because the instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs.

In holding that error resulted, the opinion operates on the assumed basis that customer restrictions, and territorial restrictions, in the context of this case, are wholly separate offenses. This is a misconception.

The inherent vice of a "territorial" restriction is that a seller is restricted to making sales only to customers within a prescribed geographic area. Without the vertical confinement of sales to customers within the area, there is no territorial restriction. The two are inextricably intertwined, and the offense of territorial restriction necessarily comprehends confinement of sales to customers within a prescribed territory.

Therefore, the basic offense of territorial restriction requires, for proper definition, the instruction given by the trial court. The correctness of these instructions is not challenged, but in some manner, not fully understood by the writer, the Court's opinion advocates the proposition that including the instructions relating to restrictions on sales to customers may have confused the jury insofar as the award of damages is concerned.

It was Mr. Kestenbaum's contention in the trial court that the maintenance of a warehouse in each separate territorial area granted Plaintiff by Falstaff pursuant to three separate distributorship agreements was an unnecessary expense directly

caused by the prohibited territorial division practice, The Court of Appeals accepted this as a valid proposition and recognized the unnecessary warehouse expense as a recoverable element of damages attributable to the territorial restriction. How, then, can it be error to properly define the offense of territorial restriction? If the record admitted any possibility that the jury might have awarded damages for loss of sales to customers outside the assigned territory, then the ascribing of error might be justified. It would not be corrected, however, by eliminating reference to restrictions on sales to customers outside the assigned territory, for this would result in an incomplete (and confusing) definition of the per se violation. Such an error would properly be corrected by an affirmative instruction to refrain from awarding any damages for loss of sales to any customers outside the prescribed territory.

However, under this record, it is impossible for the jury to have been confused about the matter, or to have made any award for loss of sales to customers outside the assigned area. Plaintiff-Petitioner's position was made abundantly clear in evidence and argument. Exhibits completely detailing the claims of damages were introduced and listed the exact amounts and nature of the damages claimed. These damages totaled $121,230.02, according to an exhibit which recapped all the items of damages proved by the plaintiff. The Trial Court affirmatively instructed the jury that the Plaintiff alleged damages in the total sum of $121,230.02, and told the jury "the damages claimed does fix a maximum limit and the jury may not award Plaintiff more than the amount claimed" App. 31-32; R. 487-488. It is clear, therefore, that the jury could not possibly have heeded the Court's instructions and at the same time made an award for any element of damage not specifically comprehended by Plaintiff's damage schedules.

It is equally clear (and for the same basic reasons) that the jury could not have awarded "double damages" for any element comprehended by Plaintiff Kestenbaum's damage schedules. The trial court's instructions simply would not permit this. The fact that Mr. Kestenbaum's attorney argued that warehouse expense would be a recoverable item whether considered to be caused by

territorial restriction or by a general restraint of trade certainly could not be said to be justification for apprehension that the jury might have been persuaded to award "double damages". The Trial Court's instructions clearly point out that there may be more than one proximate cause of an event or loss, which is consistent with the teaching of *Terrell v. Household Goods Carrier Bureau,* 494 F.2d 16. The instructions also contain explicit precautionary directions against awarding more than the actual damages suffered and put a ceiling on damages which covers only the specified items set forth in Plaintiff's exhibits. Under these circumstances no "double damages" award was possible.

In summation it is clear that (1) the trial court's instructions are legally correct, and are not assailed either by Falstaff or by the opinion of the Court of Appeals; (2) the unnecessary warehouse cost was an element of damages properly recoverable upon the finding of the maintenance of an illegal territorial distribution scheme; (3) proper definition of the per se offense of territorial restriction requires that the jury be informed that it is a restriction confining sales to customers within a prescribed geographic area; (4) the evidence, particularly Kestenbaum's damage schedules, and the argument to the jury made clear that Mr. Kestenbaum made no claim for damages resulting from loss of sales to customers outside the prescribed territory, or for any element of damage not specifically comprehended by the Plaintiff's damage exhibits; and (5) the trial court's charge made it explicit that while there may be more than one proximate cause of an event or loss, the jury could not award damages for any element not specifically claimed and proved, and comprehended by the damage schedules. Accordingly, no possible error in the verdict could have resulted from the instructions relating to territorial restrictions.

Furthermore, even if the instructions were erroneous, that error was waived by Falstaff. The only objection to the Trial Court's charge relating to territorial restrictions which Falstaff made is embodied in paragraph (m), App. 37-38, R. 418-419, which reads as follows:

"Defendant objects to the Court's charge for the reason that it fails to instruct the jury that the measure of damages on the issue of whether Plaintiff was prohibited from reselling outside the area of primary responsibility is the profit which he would have realized on any sale that he would otherwise made outside of his area of primary responsibility, less loss of profit which he would have sustained had other Falstaff distributors been permitted to sell beer to customers whom he served".

It is clear that this ojbection did not in any way, shape, form, or fashion touch upon the error which the lower court's opinion ascribes to the trial court's instructions. Accordingly, such error has been waived and was not properly preserved. The error (if any) is not such that the Court of Appeals could properly consider "sua sponte", and therefore the lower court should not have considered it.

Rule of Reason – Pulbic Injury

In the final section of the Court of Appeals' opinion (Section V), the conclusion is reached that a showing of "public injury" is still required in proving a general restraint or "rule of reason" violation under Section 1 of the Sherman Act.

In arriving at this conclusion, the lower Court confuses concepts relating to "public injury" and "rule of reason" in such a way that if the opinion stands, and is subsequently required to be followed in the Fifth Circuit, antitrust scholars will be able to state definitely that a showing of public injury is required in a "rule of reason" case in the Fifth Circuit, but will have trouble explaining why.

This question arose in a pecular fashion. In actuality, the observations of the lower court relating to public injury are surplusage, since the trial court instructed upon public injury, and those instructions are not attacked as being incorrect.

(Nor does the Appeals Court indicate that the proof was not sufficient to sustain a jury finding of "public injury"). However, Falstaff urged before the Court of Appeals contentions which equated proof of "public injury" with proof of specific injury to competition. The Court's opinion correctly holds that proof of specific injury to competition is not required, but then launched into a discorge which mixes and apparently uses interchangeably the concepts of "public injury", "restraint of trade", "unreasonable restraint of trade", and "rule of reason".

The Appeals Court asserts that the Petitioner contends that in a general restraint (i.e., a non-per se Section 1) case, a Plaintiff need only show a violation of the antitrust laws and damage to himself. This is not true. The rule of reason has not been abolished, and retains as much vitality now as when it was judicially engrafted upon the law by the *American Tobacco* and *Standard Oil* opinions. Petitioner has not disputed the fact that there is a greater burden of proof in a non-per se Section 1 case than where a per se violation exists. The requirements of the rule of reason must still be satisfied. The question is: What are those requirements; Petitioner only contends that the "public injury" concept has been excised from the definition of "unreasonable restraint of trade".

Klors v. Broadway-Hale Stores, Inc., 359 US 207, 3 L.Ed.2d 741, 79 S.Ct. 705 (1959) was the first major Supreme Court opinion which raised the question of the continued validity of inclusion of the "public injury" element in the "rule of reason" definition. However, its language was qualified by certain scholars and in certain opinions on the basis that it dealt with a group boycott, which is a per se violation.

Klors was followed by *Radiant Burners v. Peoples Gas, Light and Coke Co.*, 364 US 656 (1961). There the Court of Appeals had held that there was no boycot, conspiracy to boycott, or other form of per se violation shown and, therefore, the Plaintiff had the burden of proving such general injury to the competitive process that the public at large suffered economic harm (which is one method of defining the "public injury" element of the rule of reason test). The Supreme Court held that this did not accord with the decision in the *Klors* case.

Still, the argument persisted both with respect to *Klors* and *Radiant Burners* that the cases dealt with concerted refusals to deal which are per se violations. But the Supreme Court clarified its position in the case of *In The Matter of Criminal Contempt of Thomas C. McConnell*, 370 US 230. The case involved an appeal from the district court ruling that an attorney in an anti-trust case could not offer certain proof until he proved that economic injury resulted to the public. The counsel was held in contempt for making known to the court his intention to pursue the particular line of questioning which incurred the ruling. The Supreme Court reversed the ruling of the trial court, stating:

> ". . .we have held that the right of recovery of a Plaintiff in a treble damage antitrust case does not depend at all on proving economic injury to the public".

The Court cited *Radiant Burners, Klors,* and *Radovich v. N.F.L.*, 352 US 455, 1 L.Ed.2d 456, 77 S.Ct. 490 in support of this proposition.

No distinction is made with regard to per se and non-per se violations, and this language should put to rest any question about inclusion of the element of public injury in the rule of reason test.

Abundant additional support is to be found. In *Potter v. Columbia Broadcasting System,* 358 US 464 (1961) the Court said:

> "To the extent that this argument suggests that there is no violation of the antitrust laws because the public will receive the same service, it has been foreclosed with this Court's decision in *Klors*."

The case of *United States v. Greater Blouse, Etc.*, 177 F.Supp. 213, states unequivocally that *Klors* repudiated the requirement of showing public injury. *Syracuse Broadcasting Corporation v. Newhouse,* 295 F.2d 269 (2d Cir. 1961) summarizes and explains at page 266-7:

> "Proof of public injury: Throughout the trial stage of this case the judge below indicated that Plaintiff, in order to make out the Sherman Act claim, must allege and prove that the alleged conspiracy was injurious to the public. In recent years, a number of courts have held that a plaintiff in a Sherman Act treble damage action must allege and prove public injury as a separate element, i.e., that the price, quality, quantity of goods offered to the public was affected by the alleged conspiracy. See, *E. G. Shotkin v. General Electric Company,* 10th Cir. 1948, 170 F.2d 236. However, in *Klores, Inc., v. Broadway-Hale Stores, Inc.,* 1959, 359 US 209, 79 S.Ct. 705, 3 L.Ed. 2d 741, the Supreme Court held that at least to those 'classes of restraint' which from their 'nature or character' are 'unduly restrictive' and hence forbidden by both the common law and statute . . . Congress (has) determined its own criteria of public harm and it (is) not for the courts to decide whether in an individual case injury (has) actually occurred. Id. 359 US at p. 211, 79 S.Ct. at p. 709.
>
> "This, in brief, was the state of the law at the time of the proceedings below, but in January, 1961, the Supreme Court decided *Radiant Burners Inc., v. Peoples Gas, Light & Coke Co.,* 1961, 364 US 656, 81 S.Ct. 365, 5 L.Ed.2d 358, where again the Court was faced with this issue. Although holding that the particular restraint involved fell within the *Klors* exception, the court further held that 'to state a claim upon which relief can be granted under (Sec. 1) allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby, are all the law requires.' This language would appear to eliminate public injury as a separate element in a Sec. 1 case." (last emphasis

added)

In the case of *Highland Supply Corporation v. Reynolds Metal Co.*, 238 F.Supp. 561 (1965), the question was raised whether public injury must be alleged in the complaint. The Court stated at p. 563:

> "In *I Toulmins Antitrust Laws*, Sec. 22.32, Supplement for 1964, at page 56, this is said about pleading Sec. 1 of the Sherman Act in private antitrust cases:
>
> > 'It has now been settled that a complaint need not allege injury to the public at large. See *Radiant Burners, Inc. v. Peoples Gas & Light Co.*, 364 US 656, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961). It has been held that this decision "would appear to eliminate public injury as a separate element in a Sec. 1 case." *Syracuse Broadcasting Corporation v. Newhouse*, 295 F.2d 269, (2nd Cir. 1961). See also discussion of *Radiant Burners* decision in 1961 *Duke, L. J.* 302, (1961).'
>
> "The 8th Circuit also cited the *Radiant Burners* case, supra, for the same proposition in its opinion in Footnote 2, 327 F.2d 725, page 727."

The last reference in the foregoing quotation is to the case of *Highland Supply Corp. v. Reynolds Metal Co.*, in which the following statement is contained in Footnote 2, at 327 F.2d 727:

> "Since the decision in *Radiant Burners, Inc. v. Peoples Gas & Light Co.*, 364 US 656, 81 S.Ct. 365, 5 L.Ed.2d 358 (1961), it is not necessary to allege injury to the public in a private treble damage action."

Thus, except for the Fifth Circuit, it would appear that

the spectre of "public injury" in "unreasonable restraint" cases has been exorcised. The proper framing of the test of "rule of reason" therefore, is to be found in Justice Brandeis' opinion in *Chicago Board of Trade v. U. S.*, 246 US 231, 38 S.Ct. 242, 62 F.Ed. 683, which lays down fairly simple rules for determining whether a restraint is "unreasonable". The opinion points out that the legality of an agreement or regulation cannot be determined by so simple a test as "whether it restrains competition". Justice Brandeis stated that every agreement concerning trade, every regulation of trade, restrains. The true test of legality is whether the restraint is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition. This, succinctly put, is the test of "rule of reason" and the definition of "unreasonable restraint of trade". It is the proper test to be submitted to the jury for determination of whether a non-per se violation of Section 1 exists. For the Fifth Circuit to cling to the dogma of the discredited "public injury" element of the rule of reason test is to take a giant step-backwards-in the march of progress in antitrust law.

CONCLUSION

For the various reasons set forth above, it is respectfully prayed that the Supreme Court grant a writ of certiorari and affirm the judgment of the trial court.

Respectfully submitted,

ED P. MAGRE
Humble & Magre
Cameron, Texas

JACK N. PRICE
306 E. 11th, Suite L-7
Austin, Texas 78701

APPENDIX

Appendix - 1

Dana I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING
CORPORATION,
Defendant-Appellant.

No. 74-1878.

United States Court of Appeals,
Fifth Circuit.

June 16, 1975.

Wholesale distributor brought civil antitrust suit against brewery and alleged that brewery violated Sherman Act by price-fixing, by employing territorial restrictions on resale of beer, by participation in a general combination and conspiracy in restraint of trade, and by placing restraints on distributor's sale of the distributorship. The United States District Court for the Western District of Texas, at Waco, Jack Roberts, J., entered judgment in favor of distributor, and brewery appealed. The Court of Appeals, Clark, Circuit Judge, held that distributor failed to prove an injury to his business resulting from brewery's asserted price-fixing actions and thus issue of price fixing should not have been submitted to jury, that jury should not have been instructed that brewery would be guilty of a per se violation of antitrust laws if jury found that brewery dictated sale price of distributorship, and that the trial court erred in submitting to jury the issue of whether brewery was guilty of restraining sales to customers outside distributor's prescribed geographical area.

Reversed and remanded.

1. **Monopolies—28(7.1, 7.2)**
In order to recover treble damages under Clayton Act, plaintiff must prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done. Clayton Act, § 4, 15 U.S.C.A. § 15.

2. **Monopolies—17(1.3)**
Brewery's policy of automatically raising its selling price to wholesale distributor by one-half of amount of any price increase imposed by distributor in adherence to brewery's "stay competitive" requirement might be classified as arbitrary, but such increase was not itself violative of antitrust laws, and did not afford a basis for proof of injury even though it was coupled with a price ceiling requirement which was a per se violation. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

3. **Monopolies—28(7.2)**
A prerequisite to wholesale distributor's recovery for brewery's allegedly wrongful price-fixing activity was a showing that the price ceiling on sales by distributor, disregarding the price charged to him, caused injury. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

4. **Monopolies—28(8)**
Where wholesale distributor failed to offer any competent evidence to establish that brewery's allegedly wrongful price-fixing activity produced injury to him, no jury issue existed. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

5. **Monopolies—28(7.5, 7.6)**
Even if wholesale distributor had not admitted that brewery's "stay competitive" policy was logical and proper, and had proffered evidence indicating that requiring him to meet prices of other similar products caused him injury, distributor's price-fixing claim was deficient and did not furnish basis for recovery of treble damages, where brewery did not violate any antitrust stricture by raising its price to its wholesalers, and distributor's only proof of extent of injury was calculation of sum of brewery's increased selling price to him. Clayton Act, §4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

6. **Monopolies—28(7.6)**
Leniency should be permitted in showing damages in private antitrust actions, but a damage assessment based wholly on speculation and guesswork is improper. Clayton Act, § 4, 15 U.S.C.A. § 15.

7. **Monopolies—28(7.2)**
In light of admission of wholesale distributor, who attacked brewery's price promotions in which he sold beer at a discount as a type of price-fixing, that he would have participated in some such promotions voluntarily as a matter of sound business practice, it was incumbent upon distributor to reveal what pro-

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portion of the total costs were attributable to such voluntary promotions as well as showing what sales gains and losses he experienced before and after he unwillingly followed brewery's requirements, and without such proof a jury could not compute the amount of loss recoverable on a basis other than mere speculation and guesswork. Clayton act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies—28(9)

Wholesale distributor, who attacked brewery's price promotions in which he sold beer at a discount as a type of price-fixing scheme, did not have a right to recover all costs incurred in price-fixing promotions regardless of whether he was compelled to participate, or participated voluntarily. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies—28(7.1)

Even if brewery dictated sale price of distributorship franchise, brewery would not be guilty of a per se violation of antitrust laws. Clayton Act, § 4, 15 U.S.C.A. § 15: Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Monopolies—17(2.3)

Any restraint on sale price of distributorship franchise legitimately imposed by brewery to safeguard distribution-rights privilege did not have such a deleterious impact as to create antitrust illegality as a matter of law, and rather necessitated an inquiry into the business purpose and reasonbleness of the restraint employed, and should be measured under rule of reason standard. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. Monopolies—17(2.1)

Brewery could legitimately restrict class of persons with whom it would agree to continue a distributorship franchise, so long as such restriction was not artifically employed to further some unlawful practice. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Monopolies—17(2.1)

A refusal to deal becomes illegal under Sherman Act only when it produces an unreasonable restraint of trade. Sherman Anti-Trust Act, § 1 15 U.S.C.A. § 1.

13. Monopolies—17(2.3)

Brewery had a right to restrict sales price of one of its distributorship franchises to the reasonable value of that franchise in order to insure that the purchaser would have a chance to realize a reasonable return on its investment. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

14. Monopolies- 17(2.3)

Test of antitrust legality of brewery's restraint, if any, on sale price of one of its distributorship franchises was whether the effect upon competition in market place was substantially adverse. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

15. Monopolies--12(1.10)

Only those acts, contracts or agreements which unduly obstruct the due course of trade, or which injuriously restrain trade because of their inherent nature or effect, or because of their evident purpose are unlawful under rule of reason. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

16. Monopolies—28(8)

Jury should not have been permitted to consider issue of whether brewery was guilty of restraining sales to customers outside wholesale distributor's prescribed geographical area, in absence of any proof of extent of damage to distributor's business proximately caused by such customer restraint. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

17. Monopolies—28(7.2)

Wholesale distributor, who sought to recover treble damages on basis of brewery's alleged violation of Sherman Act by employing territorial restrictions on resale of beer, was required to proffer evidence which would provide a reasonable basis for estimating the extent of injury caused by such a territorial restriction. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

18. Damages—6

Where wrong is of such a nature as to preclude exact ascertainment of amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation.

19. Damages—6

Wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury.

20. Damages—6

An award may not be based solely upon speculation or guesswork.

21. Monopolies—28(9)

Specific elements to be considered in calculating "good will" value of a business in a civil antitrust suit are the amount of profits the business has made over and above an amount fairly attributable to return on capital investment and to labor of owner, and whether there is a reasonable prospect that this additional profit will continue into future, considering all circumstances existing and known as of date of the valuation. Clayton Act, § 4, 15 U.S.C.A. § 15.

22. Evidence—474(16)

Wholesale distributor's estimation of "good will" value of his business would be admissible in civil antitrust suit. Clayton Act, § 4, 15 U.S.C.A. § 15; Federal Rules of Evidence, rule 702, 28 U.S.C.A.

23. Federal Civil Procedure—1194

An owner is competent to give his opinion on value of his property. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

24. Federal Civil Procedure—1194

An owner's opinion on value of his property is subject to attack through cross-examination or independent evidence refuting the owner's estimate, with jury as fact finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

25. Federal Civil Procedure—1211

Where owner bases his estimation of value of his property solely on speculative factors, owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to jury. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

26. Monopolies—28(7.2)

A plaintiff in a private antitrust action need only show that restraint of trade tends or is reasonably calculated to prejudice the public interest, and is not required to shoulder the more onerous burden of proving specific economic injury to competition. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

27. Monopolies—28(7.6)

Mere showing of violation of antitrust laws and individual damage, and not of public injury, is insufficient to permit recovery under a private restraint of trade claim. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges:

CLARK, Circuit Judge:

This is an appeal by the defendant, Falstaff Brewing Corporation, from a jury verdict in favor of the plaintiff, Dana I. Kestenbaum, in a civil antitrust suit brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, to recover damages to Kestenbaum's business as a wholesale distributor of Falstaff Beer.

The Kestenbaum distributorship was begun in 1934 by Dana Kestenbaum's father, Sam Kestenbaum, and originally encompassed within its area of primary responsibility Milam, Robertson, Burleson, Brazos, Falls and Bell counties, Texas. Prior to the years at issue in this controversy, Bell and Falls counties were transferred to other distributorships. Dana Kestenbaum became an active partner in the distributorship in 1950. He was in complete control from 1967 until he sold the distributorship in 1971, allegedly because he could no longer financially endure Falstaff's anticompetitive practices. Actually, Kestenbaum sold the distributorship territory in three separate transactions, again allegedly under duress, with Milam county going to Falstaff's Taylor, Texas distributor, Robertson county to Falstaff's Marlin, Texas distributor, and Burleson and Brazos counties to Kestenbaum's former manager.

At trial Kestenbaum asserted Falstaff had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. More particularly, he charged them with: (1) price fixing, (2) employing territorial restrictions on the

resale of Falstaff beer, (3) participation in a general combination and conspiracy in restraint of trade, and (4) placing restraints on his sale of the distributorship.[1] From a jury award of 60,517.00 dollars, trebled by the trial court to 181,551.00 dollars, Falstaff has perfected this appeal.

In this court, Falstaff excepts to the trial court's charge, challenges the sufficiency of the proof of damage and questions the method employed to measure damages. The record does establish error in regard to some of Kestenbaum's contentions. The trial court having chosen not to utilize the special verdict procedure of Fed.R.Civ.P. 49(a), which would have revealed the jury's resolution of the various theories of liability advanced,[2] we are left with no alternative but to reverse and remand the entire proceeding.

I

[1] In Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20, (5 Cir.) rehearing en banc denied, 496 F.2d 878 (5 Cir.) cert. dismissed, —U.S.—, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974), we stated: "In order to recover treble damages under Section 4 of the Clayton Act, [plaintiff must] prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done." *See* Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901-902 (5th Cir.), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973); Shaw v. Mobile Oil Corp., 60 F.R.D. 566, 568 (D.N.H.1973). Kestenbaum failed the second of this three-pronged test, *i. e.*, he failed to prove an injury to his business resulting from the defendants' asserted price-fixing actions. Thus, the trial court erred in submitting the issue of price fixing to the jury.

According to Kestenbaum's testimony, at all times while he was a distributor Falstaff fixed the prices at which he sold beer to retail accounts. Until about 1966, this price fixing allegedly consisted of instructions to distributors directing that predetermined prices be instituted at specified times. During the period from 1966 until 1971 when Kestenbaum sold his distributorship, Falstaff allegedly indirectly controlled his prices by instructing him to stay competitive with other local or "popular" brands.[3] With this directive to remain competitive, Falstaff instituted a policy of automatically raising its selling price to Kestenbaum by one-half of the amount of any price increase imposed by him in adherence to Falstaff's "stay competitive" require-

1. Kestenbaum charges that Falstaff, through its franchise agreement with him and its superior economic position: (1) imposed territorial restrictions by denying him the right to sell to retail establishments outside his four-county franchise area; (b) fixed the prices at which he sold beer to retail accounts and arbitrarily raised its price to him by one-half of all wholesale price increases he instituted pursuant to its directives; (c) periodically required him to participate in price promotions by directing that he sell at a specified discount off regular price and stand one-half of the loss resulting from the discounted price; (d) required him to maintain unnecessary warehouse facilities in Caldwell and Cameron, Texas in furtherance of its market allocation policy; (e) required him to participate in unneccessary bar spending and advertising promotions; (f) made unwarranted criticisms and threats of termination if he did not follow its directives; and (g) required that he sell his distributorship at a price set by Falstaff.

2. *See* Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 245 at 338 (1967); Ford Motor Co. v. Dallas Power & Light Co., 499 F.2d 400, 412 n. 19 (5th Cir. 1974); Simmons v. King, 478 F.2d 857, 862 n. 12 (5th Cir. 1973); Boyce v. Pi Kappa Alpha Holding Corp., 476 F.2d 447, 453 (5th Cir. 1973) (Brown, C. J., concurring); Wolfe v. Virusky, 470 F.2d 831, 837 (5th Cir. 1972) (Brown, C. J., concurring); Burns v. Anchor-Wate Co., 469 F.2d 730, 734 n. 8 (5th Cir. 1972); In re Double D. Dredging Co., Inc., 467 F.2d 468, 469 n. 3 (5th Cir. 1972); Little v. Bankers Life & Cas. Co., 426 F.2d 509, 512 (5th Cir. 1970) (Brown, C. J., concurring); Home v. Georgia Southern & Florida Ry. Co., 421 F.2d 975, 980 (5th Cir. 1970) (Brown, C. J., concurring).

3. *E. g.*, Pearl, Lone Star and Jax. Other brands, such as Schlitz and Budweiser, were designated "premium" beers and sold at a slightly higher price than popular beers.

ment. Kestenbaum claimed that this latter price-fixing scheme damaged him in the one-half increase amounts Falstaff was assessing him under its automatic price increase policy. He admitted at trial however, that he would have remained competitive in the absence of any coercion by Falstaff. The evidence further disclosed that several other Falstaff distributors who attempted to go higher than the popular price level were met with drastic reductions in sales.

[2-4] Kestenbaum submits that although it is true that he would have stayed competitive with popular brands even without a directive from Falstaff, when Falstaff's requirement that he do so was coupled with its taking of one-half of all additional revenue from his price increases on retail accounts, a situation was created in which he was not free to realize the percentage of profit that could have been attained absent this requirement. To reason that the amount of this diminished profit established any measure of antitrust damage is a non sequitur in today's case. While Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a *per se* violation. A prerequisite to Kestenbaum's recovery on this issue was a showing that the price ceiling on sales by him, disregarding the price charged to him, caused injury. Not only did he fail to prove this, he established that the wholesale price which Falstaff allegedly fixed was a proper price. While the fact of injury often involves evidentiary questions which are properly for the jury [*e. g.*, Storey Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548 (1931)], no jury issue exists where, as here, the plaintiff fails to offer any competent evidence to establish that the defendant's wrongful price-fixing activity produced injury to him.

[5,6] Even if Kestenbaum had not admitted that the "stay competitive" policy was logical and proper, and had proffered evidence indicating that requiring him to meet the prices of other similar products caused him injury, this claim still would be deficient for failure to meet *Terrell's* third requirement—that the proof give some indication of the extent of the injury. Kestenbaum claims his damages were 25,000 dollars, the sum of Falstaff's increased selling price to him, based upon one-half of all of his increases to retailers. Under the facts shown in this case, Falstaff did not violate any antitrust stricture by raising its price to its wholesalers. Kestenbaum, therefore, by introducing only the 25,000 dollar calculation to support his claim for damages for wholesale price fixing, has failed to offer any competent evidence on the amount of damage. We recognize that leniency should be permitted in showing damages in private antitrust actions, however, a damage assessment based wholly on speculation and guesswork is improper. *E. g.*, Bigelow v. RKO Pictures, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946). Because proper proof of injury and of damage was missing, the district judge should have directed a verdict for defendant on this aspect of plaintiff's price-fixing claim. If the jury calculated any part of its damage award on the sum of Falstaff's price increases to Kestenbaum, it was error. Under the enigmatic general verdict we connot know whether they did or not, so the verdict cannot stand.

[7] Plaintiff also attacks Falstaff's price promotions, in which he sold Falstaff beer at a discount, as a type of price-fixing scheme. Again plaintiff has failed to meet his burden of establishing a net economic loss. Having admitted that he would have participated in some such promotions voluntarily as a matter of sound business practice, it was incumbent upon Kestenbaum to reveal what proportion of the total costs were attributable to such voluntary promotions as well as showing what sales gains and losses he experienced before and after he unwillingly followed Falstaff's requirements. Without such proof a jury could not compute the amount of loss recoverable on a basis other than mere speculation and guesswork. Bigelow v. RKO Pictures, *supra*.

[8] Kestenbaum cites Perma Life Mufflers, Inc, v. International Paris Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), as authority for the proposition that he has the right to recover all costs incurred in price-fixing promotions regardless of whether he was compelled to participate, or participated voluntarily. *Perma Life* will not support such a broad rule. While the Supreme Court did hold that an injured party may

not be denied any recovery merely because he has participated to the extent of utilizing illegal arrangements formulated and carried out by others, it went on to say that by-products of a restriction inuring to a plaintiff's benefit can be considered in computing damages. *Id.* at 140, 88 S.Ct. 1985.[4] Proof of the extent of this benefit is precisely what was lacking here.

II

[9,10] The trial court erred in instructing the jury that if they found that Falstaff dictated the sale price of Kestenbaum's distributorship, Falstaff would be guilty of a *per se* violation of the antitrust laws.[5] The *per se* rule was judicially created to deter agreements or practices constituting unreasonable restraints on trade, having such a pernicious effect on competition and so lacking in any redeeming virtue that a declaration of illegality could be made without elaborate inquiry into the precise harm they cause or the business excuse for their use. *E. g.*, United States v. Topco Associates, Inc., 405 U.S. 596, 607, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972); White Motor Co. v. United States, 372 U.S. 253, 262, 83 S.Ct. 696, 701, 9 L.Ed.2d 738 (1963); Northern Pacific R. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Under the particular facts of the case sub judice, where the price fixer must extend the very distribution-rights privilege which gave Kestenbaum's business its value, any restraint legitimately imposed to safeguard that privilege does not have such a deleterious impact as to create illegality as a matter of law. Rather, this type of situation necessitates an inquiry into the business purpose and reasonableness of the restraint employed, and must be measured under the rule of reason standard.

[11,12] It is beyond question, and the trail judge correctly so charged, that Falstaff may legitimately restrict the class of persons with whom it would agree to continue a Falstaff franchise, so long as such restriction was not artificially employed to further some unlawful practice. *E. g.*, United States v. Arnold Schwinn & Co., 388 U.S. 365, 376, 87 S.Ct. 1856, 1864, 18 L.Ed.2d 1249 (1967); United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919). A refusal to deal becomes illegal under the Sherman Act only when it produces an unreasonable restraint of trade. *E. g.*, United States v. Park, Davis & Co., U.S. 29, 45-46, 80 S.Ct. 503, 512-13, 4 L.Ed.2d 505 (1960); Lorain Journal Co. v. United States, 342 U.S. 143, 155, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951).

[13] It logically follows that Falstaff has a right to restrict the sales price of one of its distributorship franchises to the reasonable value of that franchise in order to insure that the purchaser will have a chance to realize a reasonable return on his investment. Falstaff clearly has a strong interest in the financial vitality of a new franchisee. If the purchaser of a franchise makes a bad bargain when he buys, then he cannot give the distributorship the solid, concerned management which it must have to be successful for him and to enhance Falstaff's image and relative position in the market.

A franchisor's limited right to participate in negotiations of a franchise sale has previously been recognized by this court in Frank Coulson, Inc.—Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974), a tort action to recover for interference in contractual negotiations. In *Frank Coulson, Inc.*, we held that an automobile manufacturer possessed a limited privilege to approve or disapprove a prospective purchaser since it would deal with the purchaser in the future and he would represent it to the public. This privilege further extends to the degree of control over the dealer's sale price necessary to ensure that the new dealer starts off financially sound. *Accord*, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 429 (2nd Cir.), cert. denied, 371 U.S. 829, 83 S.Ct. 24, 9 L.3d.2d 66 (1962); Martin v. Texaco, Inc., 304 F.Supp. 498, 502-504 (S.D.Miss. 1969).

[14,15] On retrial, the jury must decide whether Falstaff restrained the sale price which Kestenbaum could receive, and, if so, whether such restraint was adopted for good business reasons and not to injure competitors. The test of antitrust legality of such a restraint is whether the effect upon competition in the marketplace is substantially adverse. United States v. Arnold Schwinn & Co., *supra*. Only those acts, contracts or agreements which unduly obstruct the due course of trade, or which injuriously restrain trade because of their inherent nature or effect, or because of their evident purpose are unlawful under the rule of reason. *E. g.*, United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1910).

III

[16] The trail court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside Kestenbaum's prescribed geographical area. It was improper to permit the jury to consider this aspect of territorial restriction since Kestenbaum failed to offer any proof of the extent of damage to his business proximately caused by such customer restraint. Kestenbaum's only proof relating to this issue was his testimony that on one occasion he had been reprimanded by Falstaff for selling to a retailer who resided outside his four-county territory, plus his testimony and that of several other witnesses that it was Falstaff's policy to restrict a distributor's sales to retailers located within the area covered by his franchise agreement. Kestenbaum never attempted to show the amount of monetary injury suffered because of loss of sales to retailers outside his territory—sales that reasonably would have been made but for Falstaff's territorial restriction policy.

[17] Again, the rule of *Terrell* requires evidence which would provide a reasonable basis for estimating the extent of injury caused by such a territorial restriction. Erroneous inclusion of the customer restraint element in the court's charge despite the complete lack of damage proof may have been prejudicial to Falstaff, since this instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs.[6] Since both allegations were argued under the general territorial restriction claim the jury may well have mistakenly awarded the amount of such unnecessary warehouse costs incurred *within* the assigned area upon a determination that Kestenbaum was wrongfully restrained from seeking customers *outside* of his allotted territory. The general verdict does not permit us to know whether this occurred.

While the composition and content of the charge is for the trial court in the first instance, we would observe that if Kestenbaum makes the requisite proof to entitle him to a charge on the imposition of unwarranted and unnecessary warehousing and distribution costs the damages attributable to such costs could be more easily understood if the measure of those damages were presented in a single instruction on that subject. If such a charge is cast as a liability-damage unit it would minimize the risk of sowing seeds of confusion between damages claimed to have arisen from activity required within the territory assigned (unnecessary warehouse costs) and activity proscribed without the territory (soliciting customers in other counties). Because these two elements have a surface sameness, care should be taken to pre-

4. We would also note that *Perma Life* expressly pretermitted deciding whether complete involvement in and voluntary support of a monopolistic scheme might bar an antitrust cause of action. Our conclusion that *Perma Life* was not intended to completely exclude the element of voluntariness as a defence to an antitrust claim accords with decisions from other circuits. Premier Electrical Constr. Co. v Miller-Davis Co., 422 F.2d 1132, 1138 (7th Cir. 1970), interpreted *Perma Life* to hold that only those plaintiffs "who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants." Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 15-16 (4th Cir. 1971), citing *Perma Life* and *Premier Electrical*, concluded that a party who voluntarily formulates and equally participates in a non-coercive agreement restraining trade cannot maintain a § 1 Sherman Act action against its partner.

5. See note 7 *infra*.

6. Kestenbaum testified Falstaff's requirement that he maintain warehouse facilities in Caldwell, Cameron and Bryan, rather than just one warehouse in Bryan as he requested, caused the unnecessary stockpiling of inventory, thereby increasing interest, expense, insurance, transportation costs, and expenditures. Kestenbaum assessed his damages for this alleged violation at 49,115.05 dollars.

serve their truly separate nature. Such an approach would also minimize the hazard that double damages would be awarded. Such a hazard is suggested since we note that plaintiff's counsel not only was allowed to argue Falstaff's alleged unnecessary warehouse costs as damages resulting from territorial allocation but also pointed to such damages as caused by a general combination and conspiracy in restraint of trade.

IV

Falstaff asserts that Kestenbaum's personal assessment of the good will value of his distributorship forms an insufficient basis to support a jury verdict. Kestenbaum retorts that his testimony is supported by the long history of the distributorship, additional testimony concerning the good will created during the distributorship's many years of operation and documentary evidence of the profits realized during those years. This supporting evidence, he contends, is sufficient to establish a reasonable foundation for his opinion on the good will of the business.[7]

In light of our decision to remand on other grounds it is unnecessary for us to rule on the sufficiency of plaintiff's proof of damage from a restriction on distributorship sale price. However, since the issue must be relitigated it is appropriate to speak to the general rules which govern its proper disposition.

[18-20] In a case such as this, where the wrong is of such a nature as to preclude exact ascertainment of the amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation. Story Parchment Co. v. Paterson Parchment Paper Co., *supra* 282 U.S. at 563, 51 S.Ct. at 250. The wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury. Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927). An award may not be based, however, solely upon speculation or guesswork. Bigelow v. RKO Radio Pictures, Inc., *supra* 327 U.S. at 267, 66 S.Ct. at 580. *See also* Terrell v. Household Goods Carriers' Bureau, *supra* at 23-24.

[21] The specific elements to be considered in calculating the "good will" value of a business are: "(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?; (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation?" Standard Oil Co. v. Moore, 251 F.2d 188, 219 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958); Simpson v. Union Oil Co., 411 F.2d 897, 909 (9th Cir.) rev'd on other grounds, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969); Central Coal and Coke Co. v. Hartman, 111 F.2d 96, 98-99 (8th Cir. 1901); Vandervelde v. Put and Call Brokers and Dealers Ass'n, 344 F.Supp. 118 (S.D.N.Y. 1972).

[22,23] We cannot know whether the new Federal Rules of Evidence will control relitigation of this case. *See* Preamble, Pub.Law 93-595, 88 Stat.1926 (Jan. 2, 1975).[8] However, whether present evidentiary rules or the new Federal Rules are applied, Kestenbaum's estimation of the sum of the above valuation elements will be admissible since under both an owner is competent to give his opinion on the value of his property. This rule, established by the weight of present authority, [*e. g.*, Berkshire Mutual Ins. Co. v. Moffett, 378 F.2d 1007 (5th Cir. 1967); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12 (4th Cir.), cert. denied, 382 U.S. 980, 86 S.Ct. 552, 15 L.Ed.2d 470 (1965); Hartford Fire Ins. Co. v. Cagle, 249 F.2d 241 (10th Cir. 1957); Lawton v. Strong, 249 F.2d 299, 302 (6th Cir. 1957); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354 (9th Cir. 1947)[9]] has now been codified in Rule 702 of the new Federal Rules of Evidence. Rule 702 provides: "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify [to specialized knowledge] in the form of opinion or otherwise."[10]

[24, 25] An owner's opinion on value, however, is subject to attack through cross-examination or independent evidence refuting the owner's estimate (Hillin v. Hagler, 286 S.W.2d 661 (Tex.Civ. App.1956)], with the jury as fact-finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. *Terrell, supra* at 24; Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., *supra* at 903. Under certain circumstances, however, for instance where the owner bases his estimation solely on speculative factors, the owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to the jury. Klapmeir v. Telecheck International, Inc., 482 F.2d 247 (8th Cir. 1973); United States v. Nall, 437 F.2d 1177, 1187 (5th Cir. 1971).

V

[26] Finally, Kestenbaum asserts that it is no longer necessary in a private antitrust action to prove "public injury" (injury to competition) as a prerequisite to recovery under a general combination and conspiracy in restraint of trade com-

7. Kestenbaum placed the good will value of his distributorship at 49,000 dollars. Falstaff, on the other hand, ahd approximated the good will value at 25,000 dollars. With Falstaff's approval, Kestenbaum ultimately sold the distributorship for a total consideration of 30,000 dollars above the value of assets and inventory.

8. The new Federal Rules of Evidence become effective on July 1, 1975, and apply to all proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."

9. Under Rule 43(a) Fed.R.Civ.P., which provides that a federal court must judge the competency of a witness by the federal statute, federal rule or state rule of the forum state depending on which favors the reception of the evidence, a federal district court sitting in Texas must apply the majority rule since it is the rule in Texas. *E. g.*, National Surety Corp. v. Seale, 499 S.W.2d 753 (Tex.Civ.App.1973) ("The testimony of the owner that he knows the value of the property is sufficient, at least prima facie, to qualify him to give an opinion."); Graves v. Trevino, 386 S.W.2d 831, ref. n. r. e. (Tex.Civ.App.1965); Fluitt v. Valley Stockyards Co., 384 S.W.2d 917, ref. n. r. e. (Tex.Civ.App.1964). More particularly, that such testimony is admissible in Texas on the issue of good will would appear beyond question in light of the holding in Scott v. Doggett, 266 S.W.2d 183, ref. n. r. e. (Tex.Civ.App. 1950), that the rule for measuring damages to good will is the same as that for measuring damages to any other property.

10. The Advisory Committee on Federal Rules of Evidence has construed Rule 702 (Testimony by Experts) to include "not only experts in the strictest sense of the word, e. g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values."

plaint. To the extent he asserts that a plaintiff in a private antitrust action need only show that the restraint tends or is reasonably calculated to prejudice the public interest, Kestenbaum is correct. Such a plaintiff is not required to shoulder the more onerous burden of proving specific economic injury to competition. In Rogers v. Douglas Tobacco Bd. of Trade, Inc., 266 F.2d 636, 644 (5th Cir. 1959), we stated: "That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Antitrust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest." (Emphasis in original.) *Accord*, Schaffer v. Universal Rundle Corp., 397 F.2d 893, 897 (5th Cir. 1968), Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F.2d 97, 104 (5th Cir. 1967), Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1973).

[27] Kestenbaum presses his theory beyond this, to the point of asserting that to recover under a restraint of trade claim a plaintiff need only show a violation of the antitrust laws and damage to himself. With this we cannot agree. Kestenbaum founds this broad contention upon the Supreme Court's holdings in Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1

L.Ed.2d 456 (1957) and its progeny.[11]

The thrust of these decisions is most succinctly stated in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961):

> By s 1, Congress has made illegal: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * *." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 515, 55 L.Ed. 619. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

An analysis of the facts in these cases demonstrates that the requirement that no more than individual injury be shown has been applied only in private antitrust actions alleging *per se* violations or actions based upon restraint of trade *and* monopolization. Our conclusion that the rule is not universal is buttressed by the Supreme Court's more recent decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962), where, *after* finding that all practices complained of were *per se* violations, the court held that the trial court's "public injury" charge was erroneous. *See* Arthur Murray, Inc. v. Reserve Plan, Inc., 406 F.2d 1138, 1145 (8th Cir. 1969). Also supportive is the Sixth Circuit's holding in Lamb Enterprises, Inc., *supra* at 517, that where there is no *per se* violation it must be determined whether the activity complained of unreasonably restrains trade, *i. e.*, is reasonably calculated to prejudice the public interest. *But see* Syracuse Broadcasting Corp. v. Newhouse, 295 F.2d 269, 276-77 (2nd Cir. 1961).

Today's resolution of the public injury issue accords with our prior holding in Harrison v. Prather, 435 F.2d 1168, 1176 (5th Cir. 1970). There, faced with plaintiff Harrison's private conspiracy in restraint of trade claim, we stated that:

> "the proposition that recover is possible if an individual proves purely personal damages, does not establish the necessary element of restraint of commerce. Harrison's authorities consist entirely of per se violations cases or cases involving activities which by their nature and character had a monopolistic tendency."

Reversed and remanded.

11. In re McConnell, 370 U.S. 230, 231, 82 S.Ct. 1288, 1290, 8 L.Ed.2d 434 (1962); Poller v. Columbia Broadcasting System, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961); Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1959).

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Dana I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING CORPORATION,
Defendant-Appellant.

No. 74-1878.

United States Court of Appeals,
Fifth Circuit.

June 16, 1975.

Wholesale distributor brought civil antitrust suit against brewery and alleged that brewery violated Sherman Act by price-fixing, by employing territorial restrictions on resale of beer, by participation in a general combination and conspiracy in restraint of trade, and by placing restraints on distributor's sale of the distributorship. The United States District Court for the Western District of Texas, at Waco, Jack Roberts, J., entered judgment in favor of distributor, and brewery appealed. The Court of Appeals, Clark, Circuit Judge, held that distributor failed to prove an injury to his business resulting from brewery's asserted price-fixing actions and thus issue of price fixing should not have been submitted to jury, that jury should not have been instructed that brewery would be guilty of a per se violation of antitrust laws if jury found that brewery dictated sale price of distributorship, and that the trial court erred in submitting to jury the issue of whether brewery was guilty of restraining sales to customers outside distributor's prescribed geographical area.

Reversed and remanded.

1. Monopolies–28(7.1, 7.2)
In order to recover treble damages under Clayton Act, plaintiff must prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done. Clayton Act, s 4, 15 U.S.C.A. s 15.

2. Monopolies–17(1.3)
Brewery's policy of automatically raising its selling price to wholesale distributor by one-half of amount of any price increase imposed by distributor in adherence to brewery's "stay competitive" requirement might be classified as arbitrary, but such increase was not itself violative of antitrust laws, and did not afford a basis for proof of injury even though it was coupled with a price ceiling requirement which was a per se violation. Clayton Act, s 4, 15 U.S.C.A. s 15; Sherman Anti-Trust Act, s 1, 15 U.S.C.A. s 1.

3. Monopolies–28(7.2)
A prerequisite to wholesale distributor's recovery for brewery's allegedly wrongful price-fixing activity was a showing that the price ceiling on sales by distributor, disregarding the price charged to him, caused injury. Clayton Act, s 4, 15 U.S.C.A. s 15; Sherman Anti-Trust Act, s 1, 15 U.S.C.A. s 1.

4. Monopolies–28(8)
Where wholesale distributor failed to offer any competent evidence to establish that brewery's allegedly wrongful price-fixing activity produced injury to him, no jury issue existed. Clayton Act, s 4, 15 U.S.C.A. s 15; Sherman Anti-Trust Act, s 1, 15 U.S.C.A. s 1.

5. Monopolies–28(7.5, 7.6)
Even if wholesale distributor had not admitted that brewery's "stay competitive" policy was logical and proper, and had proffered evidence indicating that requiring him to meet prices of other similar products caused him injury, distributor's price-fixing claim was deficient and did not furnish basis for recovery of treble damages, where brewery did not violate any antitrust stricture by raising its price to its wholesalers, and distributor's only proof of extent of injury was calculation of sum of brewery's increased selling price to him. Clayton Act, s 4, 15 U.S.C.A. s 15; Sherman Anti-Trust Act, s 1, 15 U.S.C.A. s 1.

6. Monopolies–28(7.6)
Leniency should be permitted in showing damages in private antitrust actions, but a damage assessment based wholly on speculation and guesswork is improper. Clayton Act, s 4, 15 U.S.C.A. s 15.

7. Monopolies–28(7.2)
In light of admission of wholesale distributor, who attacked brewery's price promotions in which he sold beer at a discount as a type of price-fixing, that he would have participated in some such promotions voluntarily as a matter of sound business practice, it was incumbent upon distributor to reveal what pro-

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portion of the total costs were attributable to such voluntary promotions as well as showing what sales gains and losses he experienced before and after he unwillingly followed brewery's requirements, and without such proof a jury could not compute the amount of loss recoverable on a basis other than mere speculation and guesswork. Clayton act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

8. Monopolies–28(9)
Wholesale distributor, who attacked brewery's price promotions in which he sold beer at a discount as a type of price-fixing scheme, did not have a right to recover all costs incurred in price-fixing promotions regardless of whether he was compelled to participate, or participated voluntarily. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

9. Monopolies–28(7.1)
Even if brewery dictated sale price of distributorship franchise, brewery would not be guilty of a per se violation of antitrust laws. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

10. Monopolies-17(2.3)
Any restraint on sale price of distributorship franchise legitimately imposed by brewery to safeguard distribution-rights privilege did not have such a deleterious impact as to create antitrust illegality as a matter of law, and rather necessitated an inquiry into the business purpose and reasonableness of the restraint employed, and should be measured under rule of reason standard. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

11. Monopolies–17(2.1)
Brewery could legitimately restrict class of persons with whom it would agree to continue a distributorship franchise, so long as such restriction was not artifically employed to further some unlawful practice. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

12. Monopolies–17(2.1)
A refusal to deal becomes illegal under Sherman Act only when it produces an unreasonable restraint of trade. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

13. Monopolies–17(2.3)
Brewery had a right to restrict sales price of one of its distributorship franchises to the reasonable value of that franchise in order to insure that the purchaser would have a chance to realize a reasonable return on its investment. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

14. Monopolies- 17(2.3)
Test of antitrust legality of brewery's restraint, if any, on sale price of one of its distributorship franchises was whether the effect upon competition in market place was substantially adverse. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

15. Monopolies–12(1.10)
Only those acts, contracts or agreements which unduly obstruct the due course of trade, or which injuriously restrain trade because of their inherent nature or effect, or because of their evident purpose are unlawful under rule of reason. Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

16. Monopolies–28(8)
Jury should not have been permitted to consider issue of whether brewery was guilty of restraining sales to customers outside wholesale distributor's prescribed geographical area, in absence of any proof of extent of damage to distributor's business proximately caused by such customer restraint. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

17. Monopolies–28(7.2)
Wholesale distributor, who sought to recover treble damages on basis of brewery's alleged violation of Sherman Act by employing territorial restrictions on resale of beer, was required to proffer evidence which would provide a reasonable basis for estimating the extent of injury caused by such a territorial restriction. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

18. Damages–6
Where wrong is of such a nature as to preclude exact ascertainment of amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation.

19. Damages–6
Wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury.

20. Damages–6
An award may not be based solely upon speculation or guesswork.

21. Monopolies–28(9)
Specific elements to be considered in calculating "good will" value of a business in a civil antitrust suit are the amount of profits the business has made over and above an amount fairly attributable to return on capital investment and to labor of owner, and whether there is a reasonable prospect that this additional profit will continue into future, considering all circumstances existing and known as of date of the valuation. Clayton Act, § 4, 15 U.S.C.A. § 15.

22. Evidence–474(16)
Wholesale distributor's estimation of "good will" value of his business would be admissible in civil antitrust suit. Clayton Act, § 4, 15 U.S.C.A. § 15; Federal Rules of Evidence, rule 702, 28 U.S.C.A.

23. Federal Civil Procedure–1194
An owner is competent to give his opinion on value of his property. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

24. Federal Civil Procedure–1194
An owner's opinion on value of his property is subject to attack through cross-examination or independent evidence refuting the owner's estimate, with jury as fact finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

25. Federal Civil Procedure–1211
Where owner bases his estimation of value of his property solely on speculative factors, owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to jury. Federal Rules of Evidence, rule 702, 28 U.S.C.A.

26. Monopolies–28(7.2)
A plaintiff in a private antitrust action need only show that restraint of trade tends or is reasonably calculated to prejudice the public interest, and is not required to shoulder the more onerous burden of proving specific economic injury to competition. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

27. Monopolies–28(7.6)
Mere showing of violation of antitrust laws and individual damage, and not of public injury, is insufficient to permit recovery under a private restraint of trade claim. Clayton Act, § 4, 15 U.S.C.A. § 15; Sherman Anti-Trust Act, § 1, 15 U.S.C.A. § 1.

Appeal from the United States District Court for the Western District of Texas.

Before GOLDBERG, CLARK and GEE, Circuit Judges:

CLARK, Circuit Judge:

This is an appeal by the defendant, Falstaff Brewing Corporation, from a jury verdict in favor of the plaintiff, Dana I. Kestenbaum, in a civil antitrust suit brought under Section 4 of the Clayton Act, 15 U.S.C. § 15, to recover damages to Kestenbaum's business as a wholesale distributor of Falstaff Beer.

The Kestenbaum distributorship was begun in 1934 by Dana Kestenbaum's father, Sam Kestenbaum, and originally encompassed within its area of primary responsibility Milam, Robertson, Burleson, Brazos, Falls and Bell counties, Texas. Prior to the years at issue in this controversy, Bell and Falls counties were transferred to other distributorships. Dana Kestenbaum became an active partner in the distributorship in 1950. He was in complete control from 1967 until he sold the distributorship in 1971, allegedly because he could no longer financially endure Falstaff's anticompetitive practices. Actually, Kestenbaum sold the distributorship territory in three separate transactions, again allegedly under duress, with Milam county going to Falstaff's Taylor, Texas distributor, Robertson county to Falstaff's Marlin, Texas distributor, and Burleson and Brazos counties to Kestenbaum's former manager.

At trial Kestenbaum asserted Falstaff had violated Section 1 of the Sherman Act, 15 U.S.C. § 1. More particularly, he charged them with: (1) price fixing, (2) employing territorial restrictions on the

resale of Falstaff beer, (3) participation in a general combination and conspiracy in restraint of trade, and (4) placing restraints on his sale of the distributorship.[1] From a jury award of 60,517.00 dollars, trebled by the trial court to 181,551.00 dollars, Falstaff has perfected this appeal.

In this court, Falstaff excepts to the trial court's charge, challenges the sufficiency of the proof of damage and questions the method employed to measure damages. The record does establish error in regard to some of Kestenbaum's contentions. The trial court having chosen not to utilize the special verdict procedure of Fed.R.Civ.P. 49(a), which would have revealed the jury's resolution of the various theories of liability advanced,[2] we are left with no alternative but to reverse and remand the entire proceeding.

I

[1] In Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20, (5 Cir.) rehearing en banc denied, 496 F.2d 878 (5 Cir.) cert. dismissed, —U.S.—, 95 S.Ct. 246, 42 L.Ed.2d 260 (1974), we stated: "In order to recover treble damages under Section 4 of the Clayton Act, [plaintiff must] prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done." *See* Hobart Bros. Co. v. Malcolm T. Gilliland, Inc., 471 F.2d 894, 901-902 (5th Cir.), cert. denied, 412 U.S. 923, 93 S.Ct. 2736, 37 L.Ed.2d 150 (1973); Shaw v. Mobile Oil Corp., 60 F.R.D. 566, 568 (D.N.H.1973). Kestenbaum failed the second of this three-pronged test, *i. e.*, he failed to prove an injury to his business resulting from the defendants' asserted price-fixing actions. Thus, the trial court erred in submitting the issue of price fixing to the jury.

According to Kestenbaum's testimony, at all times while he was a distributor Falstaff fixed the prices at which he sold beer to retail accounts. Until about 1966, this price fixing allegedly consisted of instructions to distributors directing that predetermined prices be instituted at specified times. During the period from 1966 until 1971 when Kestenbaum sold his distributorship, Falstaff allegedly indirectly controlled his prices by instructing him to stay competitive with other local or "popular" brands.[3] With this directive to remain competitive, Falstaff instituted a policy of automatically raising its selling price to Kestenbaum by one-half of the amount of any price increase imposed by him in adherence to Falstaff's "stay competitive" requirement. Kestenbaum claimed that this latter price-fixing scheme damaged him in the one-half increase amounts Falstaff was assessing him under its automatic price increase policy. He admitted at trial however, that he would have remained competitive in the absence of any coercion by Falstaff. The evidence further disclosed that several other Falstaff distributors who attempted to go higher than the popular price level were met with drastic reductions in sales.

[2-4] Kestenbaum submits that although it is true that he would have stayed competitive with popular brands even without a directive from Falstaff, when Falstaff's requirement that he do so was coupled with its taking of one-half of all additional revenue from his price increases on retail accounts, a situation was created in which he was not free to realize the percentage of profit that could have been attained absent this requirement. To reason that the amount of this diminished profit established any measure of antitrust damage is a non sequitur in today's case. While Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a *per se* violation. A prerequisite to Kestenbaum's recovery on this issue was a showing that the price ceiling on sales by him, disregarding the price charged to him, caused injury. Not only did he fail to prove this, he established that the wholesale price which Falstaff allegedly fixed was a proper price. While the fact of injury often involves evidentiary questions which are properly for the jury [*e. g.*, Storey Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562, 51 S.Ct. 248, 250, 75 L.Ed. 544, 548 (1931)], no jury issue exists where, as here, the plaintiff fails to offer any competent evidence to establish that the defendant's wrongful price-fixing activity produced injury to him.

[5,6] Even if Kestenbaum had not admitted that the "stay competitive" policy was logical and proper, and had proffered evidence indicating that requiring him to meet the prices of other similar products caused him injury, this claim still would be deficient for failure to meet *Terrell's* third requirement—that the proof give some indication of the extent of the injury. Kestenbaum claims his damages were 25,000 dollars, the sum of Falstaff's increased selling price to him, based upon one-half of all of his increases to retailers. Under the facts shown in this case, Falstaff did not violate any antitrust stricture by raising its price to its wholesalers. Kestenbaum, therefore, by introducing only the 25,000 dollar calculation to support his claim for damages for wholesale price fixing, has failed to offer any competent evidence on the amount of damage. We recognize that leniency should be permitted in showing damages in private antitrust actions, however, a damage assessment based wholly on speculation and guesswork is improper. *E. g.*, Bigelow v. RKO Pictures, 327 U.S. 251, 264-65, 66 S.Ct. 574, 579-80, 90 L.Ed. 652 (1946). Because proper proof of injury and of damage was missing, the district judge should have directed a verdict for defendant on this aspect of plaintiff's price-fixing claim. If the jury calculated any part of its damage award on the sum of Falstaff's price increases to Kestenbaum, it was error. Under the enigmatic general verdict we connot know whether they did or not, so the verdict cannot stand.

[7] Plaintiff also attacks Falstaff's price promotions, in which he sold Falstaff beer at a discount, as a type of price-fixing scheme. Again plaintiff has failed to meet his burden of establishing a net economic loss. Having admitted that he would have participated in some such promotions voluntarily as a matter of sound business practice, it was incumbent upon Kestenbaum to reveal what proportion of the total costs were attributable to such voluntary promotions as well as showing what sales gains and losses he experienced before and after he unwillingly followed Falstaff's requirements. Without such proof a jury could not compute the amount of loss recoverable on a basis other than mere speculation and guesswork. Bigelow v. RKO Pictures, *supra*.

[8] Kestenbaum cites Perma Life Mufflers, Inc, v. International Paris Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), as authority for the proposition that he has the right to recover all costs incurred in price-fixing promotions regardless of whether he was compelled to participate, or participated voluntarily. *Perma Life* will not support such a broad rule. While the Supreme Court did hold that an injured party may

1. Kestenbaum charges that Falstaff, through its franchise agreement with him and its superior economic position: (1) imposed territorial restrictions by denying him the right to sell to retail establishments outside his four-county franchise area; (b) fixed the prices at which he sold beer to retail accounts and arbitrarily raised its price to him by one-half of all wholesale price increases he instituted pursuant to its directives; (c) periodically required him to participate in price promotions by directing that he sell at a specified discount off regular price and stand one-half of the loss resulting from the discounted price; (d) required him to maintain unnecessary warehouse facilities in Caldwell and Cameron, Texas in furtherance of its market allocation policy; (e) required him to participate in unneccessary bar spending and advertising promotions; (f) made unwarranted criticisms and threats of termination if he did not follow its directives; and (g) required that he sell his distributorship at a price set by Falstaff.

2. *See* Brown, Federal Special Verdicts: The Doubt Eliminator, 44 F.R.D. 245 at 338 (1967); Ford Motor Co. v. Dallas Power & Light Co., 499 F.2d 400, 412 n. 19 (5th Cir. 1974); Simmons v. King, 478 F.2d 857, 862 n. 12 (5th Cir. 1973); Boyce v. Pi Kappa Alpha Holding Corp., 476 F.2d 447, 453 (5th Cir. 1973) (Brown, C. J., concurring); Wolfe v. Virusky, 470 F.2d 831, 837 (5th Cir. 1972) (Brown, C. J., concurring); Burns v. Anchor-Wate Co., 469 F.2d 730, 734 n. 8 (5th Cir. 1972); In re Double D. Dredging Co., Inc., 467 F.2d 468, 469 n. 3 (5th Cir. 1972); Little v. Bankers Life & Cas. Co., 426 F.2d 509, 512 (5th Cir. 1970) (Brown, C. J., concurring); Home v. Georgia Southern & Florida Ry. Co., 421 F.2d 975, 980 (5th Cir. 1970) (Brown, C. J., concurring).

3. *E. g.*, Pearl, Lone Star and Jax. Other brands, such as Schlitz and Budweiser, were designated "premium" beers and sold at a slightly higher price than popular beers.

not be denied any recovery merely because he has participated to the extent of utilizing illegal arrangements formulated and carried out by others, it went on to say that by-products of a restriction inuring to a plaintiff's benefit can be considered in computing damages. *Id.* at 140, 88 S.Ct. 1985.[4] Proof of the extent of this benefit is precisely what was lacking here.

II

[9,10] The trial court erred in instructing the jury that if they found that Falstaff dictated the sale price of Kestenbaum's distributorship, Falstaff would be guilty of a *per se* violation of the antitrust laws.[5] The *per se* rule was judicially created to deter agreements or practices constituting unreasonable restraints on trade, having such a pernicious effect on competition and so lacking in any redeeming virtue that a declaration of illegality could be made without elaborate inquiry into the precise harm they cause or the business excuse for their use. *E. g.*, United States v. Topco Associates, Inc., 405 U.S. 596, 607, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972); White Motor Co. v. United States, 372 U.S. 253, 262, 83 S.Ct. 696, 701, 9 L.Ed.2d 738 (1963); Northern Pacific R. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Under the particular facts of the case sub judice, where the price fixer must extend the very distribution-rights privilege which gave Kestenbaum's business its value, any restraint legitimately imposed to safeguard that privilege does not have such a deleterious impact as to create illegality as a matter of law. Rather, this type of situation necessitates an inquiry into the business purpose and reasonableness of the restraint employed, and must be measured under the rule of reason standard.

[11,12] It is beyond question, and the trail judge correctly so charged, that Falstaff may legitimately restrict the class of persons with whom it would agree to continue a Falstaff franchise, so long as such restriction was not artificially employed to further some unlawful practice. *E. g.*, United States v. Arnold Schwinn & Co., 388 U.S. 365, 376, 87 S.Ct. 1856, 1864, 18 L.Ed.2d 1249 (1967); United States v. Colgate & Co., 250 U.S. 300, 307, 39 S.Ct. 465, 468, 63 L.Ed. 992 (1919). A refusal to deal becomes illegal under the Sherman Act only when it produces an unreasonable restraint of trade. *E. g.*, United States v. Park, Davis & Co., U.S. 29, 45-46, 80 S.Ct. 503, 512-13, 4 L.Ed.2d 505 (1960); Lorain Journal Co. v. United States, 342 U.S. 143, 155, 72 S.Ct. 181, 187, 96 L.Ed. 162 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 214, 71 S.Ct. 259, 261, 95 L.Ed. 219 (1951).

[13] It logically follows that Falstaff has a right to restrict the sales price of one of its distributorship franchises to the reasonable value of that franchise in order to insure that the purchaser will have a chance to realize a reasonable return on his investment. Falstaff clearly has a strong interest in the financial vitality of a new franchisee. If the purchaser of a franchise makes a bad bargain when he buys, then he cannot give the distributorship the solid, concerned management which it must have to be successful for him and to enhance Falstaff's image and relative position in the market.

A franchisor's limited right to participate in negotiations of a franchise sale has previously been recognized by this court in Frank Coulson, Inc.--Buick v. General Motors Corp., 488 F.2d 202 (5th Cir. 1974), a tort action to recover for interference in contractual negotiations. In *Frank Coulson, Inc.*, we held that an automobile manufacturer possessed a limited privilege to approve or disapprove a prospective purchaser since it would deal with the purchaser in the future and he would represent it to the public. This privilege further extends to the degree of control over the dealer's sale price necessary to ensure that the new dealer starts off financially sound. *Accord*, Pierce Ford Sales, Inc. v. Ford Motor Co., 299 F.2d 425, 429 (2nd Cir.), cert. denied, 371 U.S. 829, 83 S.Ct. 24, 9 L.3d.2d 66 (1962); Martin v. Texaco, Inc., 304 F.Supp. 498, 502-504 (S.D.Miss. 1969).

4. We would also note that *Perma Life* expressly pretermitted deciding whether complete involvement in and voluntary support of a monopolistic scheme might bar an antitrust cause of action. Our conclusion that *Perma Life* was not intended to completely exclude the element of voluntariness as a defence to an antitrust claim accords with decisions from other circuits. Premier Electrical Constr. Co. v Miller-Davis Co., 422 F.2d 1132, 1138 (7th Cir. 1970), interpreted *Perma Life* to hold that only those plaintiffs "who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants." Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3, 15-16 (4th Cir. 1971), citing *Perma Life* and *Premier Electrical*, concluded that a party who voluntarily formulates and equally participates in a non-coercive agreement restraining trade cannot maintain a s 1 Sherman Act action against its partner.

5. See note 7 *infra*.

[14,15] On retrial, the jury must decide whether Falstaff restrained the sale price which Kestenbaum could receive, and, if so, whether such restraint was adopted for good business reasons and not to injure competitors. The test of antitrust legality of such a restraint is whether the effect upon competition in the marketplace is substantially adverse. United States v. Arnold Schwinn & Co., *supra*. Only those acts, contracts or agreements which unduly obstruct the due course of trade, or which injuriously restrain trade because of their inherent nature or effect, or because of their evident purpose are unlawful under the rule of reason. *E. g.*, United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct 632, 55 L.Ed. 663 (1910).

III

[16] The trail court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside Kestenbaum's prescribed geographical area. It was improper to permit the jury to consider this aspect of territorial restriction since Kestenbaum failed to offer any proof of the extent of damage to his business proximately caused by such customer restraint. Kestenbaum's only proof relating to this issue was his testimony that on one occasion he had been reprimanded by Falstaff for selling to a retailer who resided outside his four-county territory, plus his testimony and that of several other witnesses that it was Falstaff's policy to restrict a distributor's sales to retailers located within the area covered by his franchise agreement. Kestenbaum never attempted to show the amount of monetary injury suffered because of loss of sales to retailers outside his territory—sales that reasonably would have been made but for Falstaff's territorial restriction policy.

[17] Again, the rule of *Terrell* requires evidence which would provide a reasonable basis for estimating the extent of injury caused by such a territorial restriction. Erroneous inclusion of the customer restraint element in the court's charge despite the complete lack of damage proof may have been prejudicial to Falstaff, since this instruction could have been misinterpreted by the jury to authorize an award on Kestenbaum's separate claim for unnecessary warehouse costs.[6] Since both allegations were argued under the general territorial restriction claim the jury may well have mistakenly awarded the amount of such unnecessary warehouse costs incurred *within* the assigned area upon a determination that Kestenbaum was wrongfully restrained from seeking customers *outside* of his allotted territory. The general verdict does not permit us to know whether this occurred.

While the composition and content of the charge is for the trial court in the first instance, we would observe that if Kestenbaum makes the requisite proof to entitle him to charge on the imposition of unwarranted and unnecessary warehousing and distribution costs the damages attributable to such costs could be more easily understood if the measure of those damages were presented in a separate instruction on that subject. If such a charge is cast as a liability-damage unit it would minimize the risk of sowing seeds of confusion between damages claimed to have arison from activity required within the territory assigned (unnecessary warehouse costs) and activity proscribed without the territory (soliciting customers in other counties). Because these two elements have a surface sameness, care should be taken to pre-

6. Kestenbaum testified Falstaff's requirement that he maintain warehouse facilities in Caldwell, Cameron and Bryan, rather than just one warehouse in Bryan as he requested, caused the unnecessary stockpiling of inventory, thereby increasing interest, expense, insurance, transportation costs, and expenditures. Kestenbaum assessed his damages for this alleged violation at 49,115.05 dollars.

serve their truly separate nature. Such an approach would also minimize the hazard that double damages would be awarded. Such a hazard is suggested since we note that plaintiff's counsel not only was allowed to argue Falstaff's alleged unnecessary warehouse costs as damages resulting from territorial allocation but also pointed to such damages as caused by a general combination and conspiracy in restraint of trade.

IV

Falstaff asserts that Kestenbaum's personal assessment of the good will value of his distributorship forms an insufficient basis to support a jury verdict. Kestenbaum retorts that his testimony is supported by the long history of the distributorship, additional testimony concerning the good will created during the distributorship's many years of operation and documentary evidence of the profits realized during those years. This supporting evidence, he contends, is sufficient to establish a reasonable foundation for his opinion on the good will of the business.[7]

In light of our decision to remand on other grounds it is unnecessary for us to rule on the sufficiency of plaintiff's proof of damage from a restriction on distributorship sale price. However, since the issue must be relitigated it is appropriate to speak to the general rules which govern its proper disposition.

[18-20] In a case such as this, where the wrong is of such a nature as to preclude exact ascertainment of the amount of damages, plaintiff may recover upon a showing of the extent of the damages as a matter of just and reasonable inference, although the result may be only an approximation. Story Parchment Co. v. Paterson Parchment Paper Co., *supra* 282 U.S. at 563, 51 S.Ct. at 250. The wrongdoer may not complain of inexactness where his actions preclude precise computation of the extent of the injury. Eastman Kodak Co. v. Southern Photo Co., 273 U.S. 359, 379, 47 S.Ct. 400, 71 L.Ed. 684 (1927). An award may not be based, however, solely upon speculation or guesswork. Bigelow v. RKO Radio Pictures, Inc., *supra* 327 U.S. at 267, 66 S.Ct. at 580. *See also* Terrell v. Household Goods Carriers' Bureau, *supra* at 23-24.

[21] The specific elements to be considered in calculating the "good will" value of a business are: "(1) What profit has the business made over and above an amount fairly attributable to the return on the capital investment and to the labor of the owner?; (2) What is the reasonable prospect that this additional profit will continue into the future, considering all circumstances existing and known as of the date of the valuation?" Standard Oil Co. v. Moore, 251 F.2d 188, 219 (9th Cir. 1957), cert. denied, 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148 (1958); Simpson v. Union Oil Co., 411 F.2d 897, 909 (9th Cir.) rev'd on other grounds, 396 U.S. 13, 90 S.Ct. 30, 24 L.Ed.2d 13 (1969); Central Coal and Coke Co. v. Hartman, 111 F.2d 96, 98-99 (8th Cir. 1901); Vandervelde v. Put and Call Brokers and Dealers Ass'n, 344 F.Supp. 118 (S.D.N.Y. 1972).

[22,23] We cannot know whether the new Federal Rules of Evidence will control relitigation of this case. *See* Preamble, Pub.Law 93-595, 88 Stat.1926 (Jan. 2, 1975).[8] However, whether present evidentiary rules or the new Federal Rules are applied, Kestenbaum's estimation of the sum of the above valuation elements will be admissible since under both an owner is competent to give his opinion on the value of his property. This rule, established by the weight of present authority, [*e. g.*, Berkshire Mutual Ins. Co. v. Moffett, 378 F.2d 1007 (5th Cir. 1967); Lee Shops, Inc. v. Schatten-Cypress Co., 350 F.2d 12 (4th Cir.), cert. denied, 382 U.S. 980, 86 S.Ct. 552, 15 L.Ed.2d 470 (1965); Hartford Fire Ins. Co. v. Cagle, 249 F.2d 241 (10th Cir. 1957); Lawton v. Strong, 249 F.2d 299, 302 (6th Cir. 1957); Universal Pictures Co. v. Harold Lloyd Corp., 162 F.2d 354

7. Kestenbaum placed the good will value of his distributorship at 49,000 dollars. Falstaff, on the other hand, ahd approximated the good will value at 25,000 dollars. With Falstaff's approval, Kestenbaum ultimately sold the distributorship for a total consideration of 30,000 dollars above the value of assets and inventory.

8. The new Federal Rules of Evidence become effective on July 1, 1975, and apply to all proceedings then pending, except to the extent that application of the rules would not be feasible, or would work injustice, in which event former evidentiary principles apply."

(9th Cir. 1947)*] has now been codified in Rule 702 of the new Federal Rules of Evidence. Rule 702 provides: "a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify [to specialized knowledge] in the form of opinion or otherwise."[9]

[24, 25] An owner's opinion on value, however, is subject to attack through cross-examination or independent evidence refuting the owner's estimate (Hillin v. Hagler, 286 S.W.2d 661 (Tex.Civ. App.1956)], with the jury as fact-finder shouldering the responsibility of judging the credibility of the witness, resolving the conflicting evidence, and assessing the weight of opinion testimony. *Terrell, supra* at 24; Hobart Brothers Co. v. Malcolm T. Gilliland, Inc., *supra* at 903. Under certain circumstances, however, for instance where the owner bases his estimation solely on speculative factors, the owner's testimony may be of such minimal probative force to warrant a judge's refusal even to submit the issue to the jury. Klapmeir v. Telecheck International, Inc., 482 F.2d 247 (8th Cir. 1973); United States v. Nall, 437 F.2d 1177, 1187 (5th Cir. 1971).

V

[26] Finally, Kestenbaum asserts that it is no longer necessary in a private antitrust action to prove "public injury" (injury to competition) as a prerequisite to recovery under a general combination and conspiracy in restraint of trade com-

9 Under Rule 43(a) Fed.R.Civ.P., which provides that a federal court must judge the competency of a witness by the federal statute, federal rule or state rule of the forum state depending on which favors the reception of the evidence, a federal district court sitting in Texas must apply the majority rule since it is the rule in Texas. *E. g.*, National Surety Corp. v. Seale, 499 S.W.2d 753 (Tex.Civ.App.1973) ("The testimony of the owner that he knows the value of the property is sufficient, at least prima facie, to qualify him to give an opinion."); Graves v. Trevino, 386 S.W.2d 831, ref. n. r. e. (Tex.Civ.App.1965); Fluitt v. Valley Stockyards Co., 384 S.W.2d 917, ref. n. r. e. (Tex.Civ.App.1964). More particularly, that such testimony is admissible in Texas on the issue of good will would appear beyond question in light of the holding in Scott v. Doggett, 266 S.W.2d 183, ref. n. r. e. (Tex.Civ.App. 1950), that the rule for measuring damages to good will is the same as that for measuring damages to any other property.

plaint. To the extent he asserts that a plaintiff in a private antitrust action need only show that the restraint tends or is reasonably calculated to prejudice the public interest, Kestenbaum is correct. Such a plaintiff is not required to shoulder the more onerous burden of proving specific economic injury to competition. In Rogers v. Douglas Tobacco Bd. of Trade, Inc., 266 F.2d 636, 644 (5th Cir. 1959), we stated: "That does not mean that specific public injury must be proved before a private person can recover; but before it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Antitrust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest." (Emphasis in original.) *Accord*, Schaffer v. Universal Rundle Corp., 397 F.2d 893, 897 (5th Cir. 1968), Cherokee Laboratories, Inc. v. Rotary Drilling Services, Inc., 383 F.2d 97, 104 (5th Cir. 1967), Lamb Enterprises, Inc. v. Toledo Blade Co., 461 F.2d 506 (6th Cir. 1973).

[27] Kestenbaum presses his theory beyond this, to the point of asserting that to recover under a restraint of trade claim a plaintiff need only show a violation of the antitrust laws and damage to himself. With this we cannot agree. Kestenbaum founds this broad contention upon the Supreme Court's holdings in Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1

10. The Advisory Committee on Federal Rules of Evidence has construed Rule 702 (Testimony by Experts) to include "not only experts in the strictest sense of the word, e. g. physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values."

L.Ed.2d 456 (1957) and its progeny.[11]

The thrust of these decisions is most succinctly stated in Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961):

> By s 1, Congress has made illegal: "Every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States * * *." Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 515, 55 L.Ed. 619. Congress having thus prescribed the criteria of the prohibitions, the courts may not expand them. Therefore, to state a claim upon which relief can be granted under that section, allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires.

An analysis of the facts in these cases demonstrates that the requirement that no more than individual injury be shown has been applied only in private anti-trust actions alleging *per se* violations or actions based upon restraint of trade *and* monopolization. Our conclusion that the rule is not universal is buttressed by the Supreme Court's more recent decision in Continental Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690, 708, 82 S.Ct. 1404, 1415, 8 L.Ed.2d 777 (1962), where, *after* finding that all practices complained of were *per se* violations, the court held that the trial court's "public injury" charge was erroneous. *See* Arthur Murray, Inc. v. Reserve Plan, Inc., 406 F.2d 1138, 1145 (8th Cir. 1969). Also supportive is the Sixth Circuit's holding in Lamb Enterprises, Inc., *supra* at 517, that where there is no *per se* violation it must be determined whether the activity complained of unreasonably restrains trade, *i. e.*, is reasonably calculated to prejudice the public interest. *But see* Syracuse Broadcasting Corp. v. Newhouse, 295 F.2d 269, 276-77 (2nd Cir. 1961).

Today's resolution of the public injury issue accords with our prior holding in Harrison v. Prather, 435 F.2d 1168, 1176 (5th Cir. 1970). There, faced with plaintiff Harrison's private conspiracy in restraint of trade claim, we stated that:

> "the proposition that recover is possible if an individual proves purely personal damages, does not establish the necessary element of restraint of commerce. Harrison's authorities consist entirely of per se violations cases or cases involving activities which by their nature and character had a monopolistic tendency."

Reversed and remanded.

11. In re McConnell, 370 U.S. 230, 231, 82 S.Ct. 1288, 1290, 8 L.Ed.2d 434 (1962); Poller v. Columbia Broadcashing System, 368 U.S. 464, 473, 82 S.Ct. 486, 491, 7 L.Ed.2d 458 (1962); Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 660, 81 S.Ct. 365, 367, 5 L.Ed.2d 358 (1961); Klors, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 211, 79 S.Ct. 705, 709, 3 L.Ed.2d 741 (1959).

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1974

No. 74-1878

D. C. Docket No. CA-W-72-CA-17

DANA I. KESTENBAUM,
Plaintiff-Appellee,

versus

FALSTAFF BREWING CORPORATION
Defendant-Appellant.

Appeal from the United States District Court for the Western District of Texas

Before GOLDBERG, CLARK and GEE, Circuit Judges,

J U D G M E N T

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and the same is hereby remanded to the said District Court in accordance with the opinion of this Court:

It is further ordered that plaintiff-appellee pay to defendant-appellant, the costs on appeal to be taxed by the Clerk of this Court.

June 16, 1975

Issued as Mandate:

Dane I. KESTENBAUM,
Plaintiff-Appellee,

v.

FALSTAFF BREWING CORPORATION,
Defendant-Appellant.

No. 74-1878.

United States, Court of Appeals,
Fifth Circuit.

Oct. 15, 1975.

Appeal from the United States District Court for the Western District of Texas; Jack Roberts, Judge.

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(5 Cir. 1975, 514 F.2d 690)

Before GOLDBERG, CLARK and GEE, Circuit Judges:

PER CURIAM:

The next to last sentence of the paragraph set out under headnote 7, 514 F.2d at 695, is deleted and the following sentence is substituted therefor:

Having admitted that he would have participated in some such promotions voluntarily as a matter of sound business practice, it was incumbent upon Kestenbaum to reveal what proportion of the total costs were attributable to such voluntary promotions.

In all other respects the petition for rehearing is DENIED.

No member of this panel nor judge in regular active service on the court having requested that the court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc in denied.

Supreme Court, U.S.
FILED
FEB 10 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-987

DANA I. KESTENBAUM,
Petitioner,

v.

FALSTAFF BREWING CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MAX HENDRICK, III
2008 First City National
Bank Building
Houston, Texas 77002

Attorney for Respondent Falstaff Brewing Corporation

Of Counsel:

VINSON, ELKINS, SEARLS, CONNALLY & SMITH
2100 First City National Bank Building
Houston, Texas 77002

DAVID B. KULTGEN
BEARD & KULTGEN
Waco Savings and Loan Association Building
1229 North Valley Mills Drive
Waco, Texas 76703

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In The

Supreme Court of the United States

October Term, 1975

No. 75-987

Dana I. Kestenbaum,

Petitioner,

v.

Falstaff Brewing Corporation,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This private treble damage antitrust action was brought by Dana I. Kestenbaum ("Kestenbaum") under Section 4 of the Clayton Act, 15 U.S.C. § 15, against Falstaff Brewing Corporation ("Falstaff") alleging numerous violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. The Petition for Writ of Certiorari omits many pertinent aspects of the proceedings in the lower courts. Accordingly, Falstaff offers the following additional statement of the case.

Kestenbaum, a former distributor of Falstaff beer in four Texas counties, sold his distributorship operations in three separate transactions in late 1970 and early 1971. Approximately one and one-half years later he filed this action, which was ultimately tried and submitted to the jury on four separate theories allegedly constituting violations

of Section 1 of the Sherman Act, 15 U.S.C. § 1: (1) price fixing; (2) territory and customer restrictions on resale of goods; (3) general combination and conspiracy in restraint of trade; and (4) restrictions on the sale of a going business concern.

The trial court's charge to the jury included instructions on the four above theories and concluded by inquiring of the amount of damages the jury might find as a result of the alleged antitrust violations in toto, rather than specifying damages separately from each alleged violation. The jury verdict consisted only of a finding for the Plaintiff and the assessment of damages in the amount of $60,517. Judgment was entered in favor of Kestenbaum for $181,551, treble the amount of the jury's verdict. Falstaff excepted to the judgment of the trial court and perfected its appeal to the United States Court of Appeals for the Fifth Circuit (the "Court of Appeals").

The predominant thrust of Falstaff's appeal was that the trial court's instructions to the jury on the substantive antitrust violations were erroneously submitted because they were unsupported by proof adduced by Kestenbaum at the trial of the case. Accordingly, Falstaff raised points of error based on the trial court's charge to the jury and the insufficiency of proof of violation, injury and damages under the various theories of liability. The Court of Appeals found error in the trial proceedings, reversed the judgment of the trial court, and remanded the case for new trial.[1]

[1] The opinion of the Court of Appeals is reported as *Kestenbaum v. Falstaff Brewing Corporation*, 514 F.2d 690 (5th Cir. 1975). The Court determined that a remand for new trial was necessary because the trial court's general charge made it impossible to determine on which one or more of the four liability theories the jury had found in favor of Kestenbaum. 514 F.2d at 693-94.

Kestenbaum now petitions this Court for a Writ of Certiorari and thereby assails virtually all aspects of the opinion of the Court of Appeals.

ARGUMENT

Petitioner Raises No Issue Justifying the Issuance of the Writ

Kestenbaum's Petition for Writ of Certiorari attacks the opinion of the Court of Appeals on a broad front. The four questions Kestenbaum seeks to bring before this Court rely on strained interpretations of the evidence presented at the trial of the case and avoid the unequivocal rulings of the Court of Appeals. Using the same tactic as he employed before the Court of Appeals, Kestenbaum attempts to uphold the judgment of the trial court by arguing theories of substantive law different from those embodied in the trial court's instructions to the jury. The Court of Appeals rejected this jury-argument approach and properly held that there was insufficient proof in the trial record to support the submission to the jury of price fixing and territorial restriction instructions. The Court of Appeals likewise held, largely as an evidentiary matter, that the trial court erred in submitting to the jury as a per se violation the alleged restraint on the price at which and persons to whom Kestenbaum could sell the goodwill or going concern value of his Falstaff distributorship. Finally, the Fifth Circuit's opinion reiterated the existing standard under which a private litigant can recover damages for alleged violation of Section 1 of the Sherman Act under a "rule of reason" approach.

In challenging the opinion of the Court of Appeals on each of the foregoing rulings, Kestenbaum's Petition does not advance any reason why this Court's writ should issue

in accordance with the criteria of Rule 19 of the Supreme Court. Although the Petition for Writ of Certiorari stands as an open invitation for Falstaff to demonstrate the insufficiency of Kestenbaum's proof by detailed reference to the evidence presented at trial and the trial court's instruction to the jury, these matters have been raised, argued, and passed upon by the Court of Appeals. No useful purpose is served by rearguing the evidentiary basis of this case, although the Petition for Writ of Certiorari obviously adopts this approach. It takes little more than a reading of the opinion of the Court of Appeals to demonstrate that the purely legal issues decided below are not of a nature and magnitude sufficient to warrant review by this Court under the criteria of Rule 19. Only brief discussion is required to confirm this proposition.

The Court of Appeals' Opinion is Properly Based on the Insufficiency of Petitioner's Proof

The Court of Appeals held that the trial court erred in submitting its price fixing charge to the jury because Kestenbaum's proof was insufficient. This ruling was founded upon the precedent of *Terrell* v. *Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *petition for cert. dismissed*, 419 U.S. 987 (1974), where the Fifth Circuit articulated an antitrust plaintiff's burden of proof as follows:

> In order to recover treble damages under section four of the Clayton Act, [plaintiff] was required to prove a violation of the antitrust laws by the defendants, an injury to his business resulting from the defendants' wrongful actions, and some indication of the amount of the damage done.

494 F.2d at 20. *Accord, Rea* v. *Ford Motor Company*, 497 F.2d 577, 589 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Deaktor* v. *Fox Grocery Co.*, 475 F.2d 1112, 1116 (3d Cir.), *cert. denied*, 414 U.S. 867 (1973); *Hobart Brothers Co.* v. *Malcolm T. Gilliland, Inc.*, 471 F.2d 894, 901-02 (5th Cir.), *cert. denied*, 412 U.S. 923 (1973).

Kestenbaum charged Falstaff with price fixing of two varieties: (1) Falstaff's alleged direction of Kestenbaum's resale prices and (2) temporary price reductions participated in by Falstaff and Kestenbaum jointly, known as price promotions. The Court of Appeals properly held that Kestenbaum failed to satisfy the *Terrell* test under either of his two price-fixing theories.

Kestenbaum did not adduce at trial sufficient proof of causation or damages under the theory that his resale prices were directed by Falstaff.[2] The Petition for Writ of Certiorari does not purport to demonstrate any damages caused him by virtue of the level of the resale prices at which he contends he was compelled by Falstaff to resell Falstaff beer. He attempts to avoid this obvious defect by viewing "price fixing" as a "scheme" involving several steps, the effect of which was to increase Kestenbaum's resale prices with one-half of the additional markup going to Falstaff. Kestenbaum attempts to justify his position by arguing that absent this so-called "scheme" he would have been permitted to retain the entire increase (Petition for Writ of Certiorari at 12). This argument ignores the practicalities of the market place as well as the applicable antitrust law.

Kestenbaum would apparently assert his right to increase prices freely, but would ascribe illegality to Falstaff's price increase to him. This position is untenable. It is obvious that the antitrust laws do not prevent a supplier from raising prices to its purchasers. It is further clear that a

[2] 514 F.2d at 694-95.

manufacturer-supplier's adjustment of prices to its distributors in view of competitive resale pricing conditions does not violate Section 1 of the Sherman Act. *Butera* v. *Sun Oil Co.*, 496 F.2d 434, 437 (1st Cir. 1974); *Swettlen* v. *Wagoner Gas and Oil, Inc.*, 373 F. Supp. 1022 (W.D. Pa. 1974), *aff'd*, 511 F.2d 1395 (3d Cir. 1975). Kestenbaum's argument simply ignores the basic evil condemned in price fixing.

It is fundamental that price fixing, in either the horizontal or vertical context, consists of the "raising, depressing, fixing, pegging, or stabilizing the price of a commodity...." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). As demonstrated by *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373 (1911), the anticompetitive evil condemned in price fixing of the type here alleged is that a supplier's continued control over a product fixes the price that the consumer must pay, which eliminates all competition among the buyers in the resale of the product. 220 U.S. at 399-400. Thus, as indicated by *Dr. Miles*, the evil is the "fixing" of resale prices. The thrust of Kestenbaum's argument is not that he was damaged or caused injury by the level of his resale prices, but that Falstaff increased its price to him.[3]

Kestenbaum's emphasis on Falstaff's price increases to him is further demonstrated by his purported damage figures, which reflect his increased cost by reason of Falstaff's price increases to him. The alleged damages do

[3] The true nature of Kestenbaum's complaint is reflected by his following testimony at trial:

Q. Well, if I understand your complaint about price-fixing, it is that every time you would go up twenty cents in your price to the retailer, Falstaff would go up ten cents in its price to you; is that what it boils down to?
A. Yes, sir, if I went up twenty cents they went up ten cents.
Q. And that's what your complaint is?
A. Yes, sir. (R. 170)

not purport to reflect lost profits arising from the level of Kestenbaum's resale prices.

Similarly, Kestenbaum's argument with respect to price promotions simply ignores the plain holding of the Court of Appeals that Kestenbaum "failed to meet his burden of establishing a net economic loss" arising from his participation in price promotions.[4] The Petition for Writ of Certiorari further ignores the theory on which the action was brought and the trial court's price fixing instruction to the jury — Falstaff's alleged direction that Kestenbaum conduct price promotions. The same oversight compelled the Court of Appeals to hold that there was insufficient proof of *Terrell's* third requirement — the amount of damages — on this aspect of Kestenbaum's price-fixing theory of liability.

The simple fact that Kestenbaum is unable to refute is that his theories of price fixing and damages purportedly arising therefrom bear no relation to his resale prices, which in the final analysis are the only prices susceptible to being "fixed" under the trial court's charge and the applicable law. As the Court of Appeals properly decided, Kestenbaum's distorted price fixing theories caused the record to be deficient in evidence of causation and damages to support submission of the trial court's instruction to the jury on this theory of antitrust violation.

The Court of Appeals further held, in accordance with the basic rule announced in *Terrell*, that the trial court erred in submitting to the jury the issue of whether Falstaff was guilty of restraining sales to customers outside of Kestenbaum's geographic area of primary interest.

[4] 514 F.2d at 695.

The rationale of this holding was clearly articulated by the Court:

> It was improper to permit the jury to consider this aspect of territorial restriction since Kestenbaum failed to offer any proof of the extent of damage to his business proximately caused by such customer restraint.[5]

The Petition for Writ of Certiorari attempts to avoid this clear holding and circuitously argues that damages from customer and territorial restrictions can be measured by the additional expense required by the maintenance of three warehouses instead of one (Petition for Writ of Certiorari at 19-21).

It is apparent that Kestenbaum attempts to obscure the distinction between territorial restrictions as instructed to the jury and what he alleges to be a division of his distributorship operations into three separate areas with a warehouse contained in each. The crux of Kestenbaum's argument in this regard is that he was required to maintain a warehouse and distribution facilities in three separate locations. Kestenbaum argued that this requirement resulted in additional expense that could have been avoided by the consolidation of his operations within a singie warehouse. This expense, as the Court of Appeals plainly noted, simply does not arise from the alleged restraint on sales to customers outside of Kestenbaum's geographic area of primary interest.[6] The Court of Appeals properly held that submission of the territorial and customer restriction

[5] 514 F.2d at 697. The Court of Appeals further emphasized the insufficiency of Kestenbaum's damage proof as follows: "Kestenbaum never attempted to show the amount of monetary injury suffered because of loss of sales to retailers outside his territory . . . ." 514 F.2d at 697.

[6] 514 F.2d at 697.

instruction "despite the complete lack of damage proof" was error.

The Court of Appeals also held that the trial court erred in instructing the jury that if they found that Falstaff dictated the sale price of Kestenbaum's distributorship, Falstaff would be guilty of a per se violation of the antitrust laws.[7] Kestenbaum's Petition for Writ of Certiorari attacks this holding on the general proposition that "a rose is a rose, and price fixing is price fixing" (Petition for Writ of Certiorari at 18), in an apparent attempt to support his argument with prose rather than judicial authority. In so doing, Kestenbaum ignores both the authorities and the underlying basis of the Court of Appeals' holding — the evidence at trial did not warrant the submission of a per se instruction to the jury on the issue of the alleged restraint on the sale of Kestenbaum's distributorship operations.

The entire gist of Kestenbaum's theory of antitrust violation in this area is that Falstaff dictated the price at which and persons to whom he could sell his distributorship. In actuality, this theory relates to the sale of the goodwill or going-concern value of Kestenbaum's distributorship, being that value over and above the fair market value of assets and inventory on hand. As indicated by footnote to the opinion of the Court of Appeals, the record demonstrates there was no dictation of the price at which Kestenbaum could sell the goodwill of his distributorship.[8] Moreover, the Court of Appeals determined, on the basis

[7] 514 F.2d at 695-96.

[8] 514 F.2d at 698 n.7. Footnote 7 to the Court of Appeals' opinion reflects that Kestenbaum felt the goodwill of his distributorship was $49,000, Falstaff approximated the value at $25,000, and Kestenbaum ultimately sold for $30,000. A statement of the figures alone demonstrates that there was no "dictation" of the goodwill price of Kestenbaum's distributorship.

of the record before it, that the alleged conduct, even if proved, would not amount to a per se violation.

The crux of a per se violation under Section 1 of the Sherman Act is conduct presumptively injurious to competition. *United States* v. *Topco Associates, Inc.*, 405 U.S. 596, 607 (1972); *White Motor Co.* v. *United States*, 372 U.S. 253, 262 (1963); *Northern Pacific Railway Co.* v. *United States*, 356 U.S. 1, 5 (1958). A review of the complete record convinced the Court of Appeals that the alleged conduct, even if proved, would be justified by legitimate business considerations and would not be so pernicious or presumptively injurious to competition that it should automatically be condemned without the necessity of analyzing its competitive effect or the reasons justifying it.

Although the Petition for Writ of Certiorari attempts to cloud the issue, the situation alleged is not one of retail price maintenance, where the evil condemned is that the supplier's continued control over a product fixes the price that the consumer must pay, which eliminates all competition among the buyers in the resale of the product. *Dr. Miles Medical Co.* v. *John D. Park & Sons Co.*, 220 U.S. 373, 399-400 (1911). Clearly, no product is passing in commerce that will be fixed in price to the ultimate consumer; there is no elimination of competition in the resale of any product. What is involved is the transfer of a right to carry on an on-going relation as a distributor of Falstaff beer. The price of the transfer of this right has no conceivable effect on the public or anyone other than the immediate parties involved, and there is certainly no elimination of competition at any level of commerce.

Accordingly, the holding of the Court of Appeals that it was error to submit the alleged restriction on the sale of Kestenbaum's distributorship as a per se violation, was

proper, in accordance with judicial authority, and compelled by the evidence adduced at trial.

The Issue of Public Injury is Improperly Raised In These Proceedings

Kestenbaum's Petition for Writ of Certiorari raises as a fourth and final question the necessity of proving public injury in antitrust cases not falling within the per se proscription of Section 1 of the Sherman Act. It is obvious that this issue is not properly raised in these proceedings, as Kestenbaum himself requested the inclusion of the public injury element in the trial court's instruction to the jury on the general combination and conspiracy in restraint of trade theory. It was only in his brief for appellee to the Court of Appeals that Kestenbaum unilaterally advanced and strenously argued that the Court should sweep aside its long-standing judicial authority and eliminate all showing of competitive injury in order for a private antitrust plaintiff to recover damages arising from conduct not amounting to per se violation. The same argument is repeated by Kestenbaum's Petition for Writ of Certiorari.

In all fairness, the ruling of the Court of Appeals on this subject was apparently designed to provide guidance for the trial court upon the retrial of the case.[9] The ruling

[9] The Court of Appeals' discussion of public injury properly relates to Kestenbaum's general combination and conspiracy in restraint of trade theory. Under this theory Kestenbaum claimed that Falstaff's actions in requiring him to maintain warehouses in various counties, conduct bar spending, and participate in advertising in the local media, coupled with less damaging activities such as the method of shipment of beer and criticism of the operation of his distributorship, constituted an unreasonable restraint of trade under the "rule of reason" approach. Based on the well settled principle that the antitrust laws are not and "were never meant to be a panacea for all wrongs," *Parmalee Transportation Co.* v. *Keeshin*, 292 F.2d 794, 804 (7th Cir.),

was merely a reiteration of the Fifth Circuit's prior holding in *Rogers* v. *Douglas Tobacco Board of Trade, Inc.*, 266 F.2d 636, 644 (5th Cir.), *cert. denied,* 361 U.S. 833 (1959), as follows:

> [B]efore it can be said that the conduct is forbidden as *unreasonably* restraining trade or commerce within the meaning of the Sherman Anti-Trust Act it must appear that it *tends* or is *reasonably calculated* to prejudice the public interest. (emphasis in original)

This ruling is clearly in accord with the "rule of reason" standard followed by the Fifth and other Circuits. *Lamb Enterprises, Inc.* v. *Toledo Blade Co.*, 461 F.2d 506, 517 (6th Cir.), *cert. denied,* 409 U.S. 1001 (1972); *Schaffer* v. *Universal Rundle Corp.*, 397 F.2d 893, 897 (5th Cir. 1968); *Cherokee Laboratories, Inc.* v. *Rotary Drilling Services, Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied,* 390 U.S. 904 (1968).

The ruling of the Court of Appeals reiterating the standard of recovery under the "rule of reason" approach simply poses no issue meritorious of this Court's review. The standard is in accord with existing authorities and, indeed, is not properly presented upon this Petition for Writ of Certiorari.

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cert. denied, 368 U.S. 944 (1961); *see Hunt* v. *Crumboch,* 325 U.S. 821, 826 (1945); *Scranton Construction Co., Inc.* v. *Litton Industries Leasing Corp.*, 494 F.2d 778, 783 (5th Cir. 1974), *cert. denied,* 419 U.S. 1105 (1975), Falstaff argued that the conduct of which Kestenbaum complained was simply not the stuff of which antitrust violations are made. Although its opinion is silent on the broader scope of Falstaff's objections to Kestenbaum's general combination and conspiracy theory, it is apparent that the Court of Appeals' treatment of the public injury issue is designed to underscore this principle. 514 F.2d at 699-700.

CONCLUSION

It is apparent that the rulings of the Court of Appeals for the Fifth Circuit attacked by Kestenbaum's Petition for Writ of Certiorari speak to evidentiary matters and are founded upon insufficiencies in the proof adduced by Kestenbaum at the trial of the case. Kestenbaum's Petition for Writ of Certiorari requests this Court to reconsider the evidence adduced at trial and to find contrary to the evidenciary rulings of the Court of Appeals. The task is obviously not one that should be undertaken by this Court. The holdings of the Court of Appeals are in accord with the applicable prevailing law and compelled by the factual record developed at the trial of the case. Petitioner has not demonstrated, as he cannot, any meritorious reason why his Petition for Writ of Certiorari should be granted. Accordingly, Falstaff submits that Kestenbaum's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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MAX HENDRICK, III
2008 First City Nat'l Bank Bldg.
Houston, Texas 77002
(713) 236-2546
Attorney for Respondent
Falstaff Brewing Corporation

Of Counsel:
VINSON, ELKINS, SEARLS, CONNALLY & SMITH
2100 First City National Bank Building
Houston, Texas 77002

DAVID B. KULTGEN
BEARD & KULTGEN
Waco Savings and Loan Association Building
1229 North Valley Mills Drive
Waco, Texas 76703

CERTIFICATE OF SERVICE

I hereby certify that pursuant to Rule 33 of this Court, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were served upon counsel for Petitioner by placing the same in the United States mail, first class postage prepaid, and properly addressed to counsel of record for Petitioner, on this 9th day of February, 1976.

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MAX HENDRICK, III

Attorney for Respondent
Falstaff Brewing Corporation